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NO. 409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

TENNESSEE COAL, IRON & RAILROAD COMPANY,
Petitioner,

versus

MUSCODA LOCAL NO. 123, ETC., ET AL.,
SLOSS-SHEFFIELD STEEL & IRON COMPANY,
Petitioner,

versus

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.,
REPUBLIC STEEL CORPORATION,
Petitioner,

versus

RAIMUND LOCAL NO. 121, ETC., ET AL.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RAIMUND LOCAL NO. 121, Etc., Et al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners (appellants in the Court below) Tennessee Coal, Iron and Railroad Company, a corporation (hereinafter referred to as Tennessee), Sloss-Sheffield Steel & Iron Company, a corporation (here-

inafter referred to as Sloss), and Republic Steel Corporation, a corporation (hereinafter referred to as Republic), separately and severally pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit entered on the 16th day of March, 1943, and as modified on the 27th day of July, 1943, in the opinion and decree denying appellants' petition for rehearing.

A transcript of the record in the case, including the proceedings in said Court, is furnished herewith in accordance with the Rules of this Court.

JURISDICTION

The jurisdiction of this Court is based on Section 240(a) of the Judicial Code, 28 U. S. C. 347,[1] as amended by the Act of February 13, 1925.

SHORT STATEMENT OF THE MATTER INVOLVED

These are actions for declaratory judgments under the provisions of the Federal Declaratory Judgment Act[2] to obtain judicial declaration whether the word "workweek" as used in Section 7 of the Fair Labor Standards Act of 1938[3] includes or excludes the time spent by the underground iron ore mining employees of petitioners in going to and from their usual places of work, and all their time spent underground and

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[1] Section 274(d) of the Judicial Code, 28 U. S. C. 400.

[2] Act of June 24, 1938, effective October 24, 1938, cited as Fair Labor Standards Act of 1938, 52 Statutes at Large, 1060-9, 29 U. S. C. 201-19 (hereinafter referred to as the Act).

while not engaged in any physical work or service for their employers.[1]

Section 7 of the Act is as follows:

"Section 7. Maximum hours.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The petitioners sought by declaratory judgments or, in the alternative, by injunctions, to prevent the bringing of a multiplicity of suits by their underground iron ore mining employees for compensation for so-called "portal to portal" travel time[2] and to obtain a declaration that there is no obligation to consider such

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[1] For petition of Tennessee see R. 25-115; of Sloss, R. 116-175; of Republic, R. 177-221; Answer of Red Ore Miners Union, R. 225-231; Answer of Smelters Union, R. 232-247; Amended Answer, R. 674-681; Answer of Intervener-Administrator, R. 289-304.

[2] "Portal to portal" time as herein referred to includes all the time (except the lunch period) consumed by the employee while underground.

travel time as time worked within the meaning of the Fair Labor Standards Act of 1938.

The United States District Court for the Southern Division of the Northern District of Alabama[4] found that:

> "The working time of the underground ore mining employees of plaintiff, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, includes all time spent by plaintiff's said employees from the time they report at the collar or portal of the mine or mouth of the mine, until they emerge from the collar, portal, or mouth of the mine at the end of the shift, and includes the aggregate of all time spent by said employees on the surface in obtaining and returning lamps, carbide and tools and in checking in and out. This time worked does not include any fixed lunch period of one-half hour or more during which said underground ore mining employee is relieved of all duties."

and decreed that counter-claims filed by the defendants for themselves and others for compensation for such working time be set down for separate trial and judgment.

From the decrees entered[5] the appellants took appeal to the United States Circuit Court of Appeals for the Fifth Circuit.[6]

The Circuit Court of Appeals (Circuit Judges Sibley, Holmes and McCord—Judge Sibley dissenting) affirmed the judgment on the principal questions involv-

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[4] R. 568; 40 Fed. Supp. 4.
[5] R. 494-506; 568-9.
[6] R. 562-660.

ing "portal to portal" travel time, but modified it by excluding from the workweek the "time spent by employees in checking in and out and procuring and returning tools, lamps and carbide."[7]

Upon petition for rehearing[8] the Circuit Court of Appeals on July 27, 1943, rendered an opinion[9] denying appellants petition for rehearing.

Copies of the original opinion of the Circuit Court of Appeals, and of the dissenting opinion, and of the opinion of the Court on petition for rehearing are set forth in the Appendix.

QUESTIONS PRESENTED

The questions presented are:

1. Did the Congress in the enactment of the Act require—regardless of custom or agreement—that the "workweek" of petitioners' underground employees should include travel time?

2. Did the Congress in the enactment of the Act intend to change the well-known "face to face"[10] basis.

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[7] Appendix, p. 64; 135 F. (2d) 320.

[8] R. 4951-4995.

[9] Appendix, p. 77.

[10] "Payment for working time spent in and about the usual working places. Because many of the underground miners (known as "productive employees") perform their work at the face of the mine where they produce ore, the practice of computing and paying wages for the time spent by the employees at work, exclusive of travel time, has always been generally referred to, and is referred to herein, as "face to face."

This reference includes service employees, such as trackmen, electricians, pipemen, etc., who do not produce coal and whose work is performed at various places in the mine. Approximately 50% of the underground employees are service employees. The wages of service employees have always been computed and paid on the hourly basis, while at times the wages of productive employees have been on the tonnage or piece basis.

of computing the wages of petitioners' underground employees as it, for generations prior to the enactment of the Act, had been understood, adopted and followed by the iron ore mining industry in Alabama and elsewhere in the United States?

3. Did the Congress in the enactment of the Act intend to render invalid the provisions in the then effective, collectively-bargained agreements which expressly provided that the wages of petitioners' underground employees should be computed on the "face to face" basis?

4. Did the Congress in the enactment of the Act intend to deny to petitioners and other members of the iron ore mining industry and their employees the right of agreeing, through the process of collective bargaining, upon a reasonable measure of what constitutes work?

5. Have the petitioners, in computing and paying for the "workweek" of their underground employees on the "face to face" basis, as provided by custom and by agreements with the representatives of their employees, complied with and discharged the obligations imposed upon them by Section 7 of the Act?

6. Does the Act purport to regulate or provide additional compensation for working conditions? In other words, does the Act authorize the Administrator to eliminate or rectify incidental perils and discomforts of underground mining or, in the alternative, to require that additional compensation be paid because of the existence of such perils and discomforts by labeling as worktime time spent under such conditions?

7. Did the Congress intend that the standard of a

"workweek" (even though established for many years prior to the enactment of the Act by custom or agreement in an industry) should be rejected and superseded by the variable concepts of the jury or other fact-finding tribunal investigating conditions in individual situations?

8. Did the Circuit Court of Appeals err in its conclusion that the question of what constituted the "workweek" of petitioners' employees was a question of fact for the jury or other fact-finding tribunal?

9. If it be decided that the Court did not err in its conclusion that a question of fact is involved in each case, did it not err in finding facts contrary to the undisputed evidence and in applying to all of the petitioners and their employees much evidence which applied to only one or more of petitioners or to only some of their employees?

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that there exist special and important reasons for the granting of the writ of certiorari herein prayed for because:

1. The decision of the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

2. The decision of the Circuit Court of Appeals is an untenable construction of an important Federal statute in that it holds that it was the intention of the Congress in the enactment of Section 7 of the Act—

(a) to annul existing wage agreements executed in good faith, with no intention of violation of the Act,

but in reliance upon long-established custom, previous interpretations of similar statutes and opinions of the Administrator under the Act until he announced a contrary opinion on March 23, 1941;

(b) to restrain employers and employees from making reasonable agreements (by collective bargaining according to the principles and under the provisions of the National Labor Relations Act) defining work for which compensation should be paid, the rates of pay provided being greatly in excess of the minimum rates specified by the Fair Labor Standards Act of 1938;

(c) to force employees and employers to adopt a construction of the words "work" and "workweek" radically different from the general concept of these words as understood and acted upon by all interested parties for many years in the iron ore mining industry.

3. The Circuit Court of Appeals has by judicial construction enlarged the scope of a Federal statute by determining that time which had not by custom or by agreement been considered as worktime should be included as part of the workweek for the purposes of the Fair Labor Standards Act of 1938, although the Act does not in terms require, and there is no evidence that Congress intended, that the word "workweek" in any industry should have any meaning other and different from that applied by custom or agreement in that particular industry.

4. The Circuit Court of Appeals has erroneously invalidated contracts executed in good faith between the parties as a result of the full process of collective

bargaining and providing a reasonable basis in harmony with the long-established and well-recognized prevailing practice existing in the industry as being a proper definition of a day's work in the ore mines.

5. As a result of the decision of the Circuit Court of Appeals, these petitioners, under the asserted claims of the defendants, stand the peril of being subjected to the payment of enormous sums of money as overtime compensation and to the other severe penalties of the Act, and the defendants will claim the windfall of a totally unexpected largesse contrary to their frequent construction of the Act and the provisions of their written agreements.

6. The decision erroneously holds that there was no justiciable controversy between petitioners, the original defendants, and the intervener-defendant with reference to the period of time subsequent to May 1, 1941, and erroneously refuses to construe Section 7 of the Act with respect to its application to such time.

7. For the reasons stated herein, the decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

8. The judgment of the Court, when considered with the two opinions, is so uncertain and doubtful in its meaning and application to the separate and several petitioners, to the separate and several mines of each petitioner, and as to the individual workers or groups of workers in each of said mines, as to call for an exercise of this Court's power of supervision.

9. The decision is in violation of the due-process clause of the Constitution of the United States.

Petitioners further respectfully submit that the importance of the question of federal law involved in the decisions is demonstrated by:

1. Its use as a judicial precedent in support of the claim of the United Mine Workers of America that (contracts and practices and administrative interpretations to the contrary notwithstanding) it was the intention of the Congress to include as a part of the "workweek" all of the underground time of coal miners.

2. The extension by the Administrator of the principle of the decision to employers and employees in various industries and to many situations not previously regarded as imposing upon employers the obligation, under the provisions of Section 7 of the Act, for the payment of traveling time.

STATEMENT

I

THE PARTIES

Petitioners[1] operate on and under Red Mountain in Jefferson County, Alabama, approximately thirteen underground iron ore mines in close proximity to each other, employing approximately 6,000 underground

[1] In addition to the petitioners the only other company in Alabama engaged in substantial underground iron ore operations is the Woodward Iron Company. Evidence was offered showing that the underground operations, practices and contractual relations of the Woodward Company with its employees were substantially the same as those of petitioners. Hereafter, where the word "petitioners" is used in connection with these matters, it is intended to includ the operations of the Woodward Iron Company.

employees. The distances from the portal to the various working places vary greatly in the same mine and even more so between the different mines. Petitioners also operate underground coal mines known as "captive mines" in close proximity to their ore mines. They employ from 6,000 to 8,000 underground miners in their coal mines.

Petitioners are members of the national iron ore mining industry and in the manufacture and sale of their products are in competition with each other and with other members of the industry.

International Union of Mine, Mill and Smelter Workers and its locals, affiliated with the CIO, and the Red Ore Miners Union, affiliated with the American Federation of Labor (this latter union being bargaining agency and defendant only in the case of Tennessee), together with certain designated officers and members of the unions and employees of the petitioners were the original parties defendant. The defendants represent substantially all the underground employees of petitoners and the suits were made class actions. The Administrator of the Act, by intervention, became a party defendant.

II

CONSTRUCTION OF SECTION 7 OF THE ACT BY THE ADMINISTRATOR

On *October 24, 1938,* the Act became effective.

On *July 27, 1940,* the Administrator of the Act made the following announcement:

"In view of the circumstances described by the industry in submitting its inquiry,* Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening. The Administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry."—(R. 4717).

The administrator has never changed or departed from this ruling.

On *March 23, 1941*, the Administrator of the Act announced (effective May 1, 1941) what he termed "A Modified Portal to Portal Wage Hour Opinion," reading as follows:

"The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

*The "inquiry" referred to was a letter dated *July 9, 1940*, signed jointly by the representatives of the United Mine Workers of America and the Appalachian Joint Conference Negotiating Committee. A copy of this letter (a portion of which is quoted in the dissenting opinion of Judge Sibley) is set forth in the Appendix.

"The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

"The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."—(R. 77).

In issuing the opinion, the Administrator stated:

"that because the Division had not heretofore taken a definite stand on the various problems involved, it would not seek to compel the payment of restitution from mine owners who have been operating on a face to face or other bases inconsistent with the principles outlined in the report. This enforcement policy of the Division cannot, however, interfere with the rights of employees or their representatives to sue under Section 16 (b) of the Fair Labor Standards Act."—(R. 78).

The Administrator, in his answer, admitted the issuance of the opinion as stated above, and alleged:

"That the proper interpretation of Section 7 of the Fair Labor Standards Act of 1938 is as set forth in the Opinion and Report, a copy of which is annexed to plaintiff's petition as Exhibit 'A'."—(R. 301).

In his answer to interrogatories the Administrator stated:

"I intend to follow the interpretation in question unless otherwise directed by the authoritative ruling

of the Courts or unless I shall subsequently decide that my prior interpretation is incorrect."—(R. 384).

III

PRIOR TO THE ENACTMENT OF THE ACT IT WAS THE "TRADITIONAL PRACTICE" IN THE ORE MINES OF ALABAMA AND ELSEWHERE TO COMPUTE WORKING TIME ON THE "FACE TO FACE" BASIS. PETITIONERS AND THEIR EMPLOYEES RECOGNIZED AND ASSENTED TO THIS PRACTICE.

At the time of and for more than fifty years prior to the enactment of the Act it had been the uniform and traditional practice in Alabama iron ore mines and in the iron ore mining industry throughout the nation:

(a) To compute working time on the "face to face" basis:

(b) To consider "work" as including the time spent by the miner at his usual working place and as excluding the time spent in traveling to and from the usual working place;

(c) To fix and pay wages; to classify and evaluate jobs; to grant wage increases and to arrange the cycles of mining operations on the "face to face" basis; and

(d) For many years prior to the enactment of the

Act, the underground employees of petitioners received either four times a month or twice a month written statements showing their earnings computed on the "face to face" basis, and, upon receiving the amount thus shown to be due them, acknowledged in writing the payment in full of all amounts due them." All the employees who testified admitted that they knew the compensation thus received and receipted for excluded pay for traveling time."

The Smelters Union on October 19, 1933, April 13, 1934, and June 13, 1935, in their written proposals for contracts, demanded the payment by the company of one-half the traveling time" and upon refusal of these demands thereafter abandoned any contention for the payment of any portion of the traveling time, and on May 26, 1936, and thereafter in their written proposals for contracts expressly defined the day's work on the "face to face" basis."

"Witness Ball, R. 806-8; T. C. I. Exhibits Y, Y-1 through Y-46, R. 3557 et seq., T. C. I. Exhibits V, V-1 through V-48, R. 3572 et seq., Sloss Exhibits 22, 22-1 to 22-77, R. 3840 et seq., Republic Exhibit No. 15, R. 4020.

"Witnesses Ball, R. 798, 840-2 Cameron, R. 1096-7, Brown, R. 1163-6, Smith, R. 1236, Scott, R. 1276, Carter, R. 1702, Goodwin, R. 1763-4, Harper, R. 1299-1300, Costner, R. 1422, Russell, 1485, DeSollar, R. 1551-2, Urquhart, R. 1632, Thompson, R. 1864, Lacey, R. 2152, Patterson, R. 2458, Scruggs, R. 2514, Gaines, R. 2849, Gilbert, R. 2898-9, Horsley, R. 2964, Butler, R. 3058-60, Trammell, R. 3122-3, White, R. 3145, Knox, R. 3162.

The testimony of witnesses in ore mines outside Alabama whose depositions were taken by the Administrator was to the same effect.—Witnesses Swanson, R. 4081, Burck, R. 4108, 4133-4; Runn, R. 4182, Debeltz, R. 4201-4, Pechek, R. 4230, Bovitz, R. 4251-2, Sopko, R. 4279, Pilotto, R. 4310, Eagloski, R. 4327.

"R. 3591, 3595 and 3623.

"T. C. I. Exhibit 10-A, R. 3629-3638.

IV

THE TRADITIONAL PRACTICE OF COMPUTING HOURS WORKED ON THE "FACE TO FACE" BASIS, WHICH HAD EXISTED FOR MANY YEARS IN THE IRON ORE MINING INDUSTRY WAS EMBODIED IN "BONA FIDE COLLECTIVE BARGAINING AGREEMENTS" BETWEEN PETITIONERS AND THEIR EMPLOYEES.

The Locals of the International Union of Mine, Mill and Smelter Workers were organized among the employees of petitioners in the spring of 1933. They became sufficiently strong to close down by strikes all mining operations in 1934 and again in 1936."

In the case of Tennessee some of the employees were represented by the Brotherhood of Mine Workers of Captive Mines which was organized prior to 1933 and was later absorbed by the American Federation of Labor under the name of Red Ore Miners Union.

The strike of 1934 was settled by the efforts of the Conciliation Service of the United States Department of Labor, the men returning to work under the provisions of letters of understanding sent by the petitioners and the unions to the Department of Labor, providing for the return to work of the employees on the "face to face" basis." The letters of understanding

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"Witness Ball, R. 869-74 and 884.
"R. 3604-18, 3750, 3861, 3983-3991.

were extended by agreement of the parties until June 24, 1936."

Thereafter petitioners (with the exception of Republic) executed written agreements with the unions defining "a day's work" in the following language:

> "Eight hours shall constitute a day's work and forty hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight hours in any one day or for overtime in excess of forty hours in any one week.
>
> "The eight hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or paid on the tonnage basis."[8]

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[7] R. 881, 3625-6, 3760.

[8] The agreements made between the unions and the Alabama iron ore mining companies containing this provision are set out in the record as follows:

Sloss Exhibit No. 8: Agreement between Sloss and Employees Representatives dated July 21, 1936.—(R. 3774).

T. C. I. Exhibit No. 18: Agreement between Tennessee and Brotherhood dated May 31, 1937.—(R. 3720);

Sloss Exhibit No. 9: Agreement between Sloss and Employees Representatives dated September 13, 1937.—(R. 3782);

T. C. I. Exhibit No. 19: Agreement between Tennessee and Brotherhood dated June 15, 1938.—R. 3728);

Sloss Exhibit No. 13: Continuation of agreement set forth as Sloss Exhibit No. 9 dated September 3, 1938.—(R. 3796);

T. C. I. Exhibit No. 14 (the same as Exhibit "C" to Tennessee petition): Agreement between Tennessee and Smelters Union dated October 6, 1938—(R. 105);

Sloss Exhibit No. 15: Agreement between Sloss and Smelters Union dated September 9, 1939.—(R. 3804);

Sloss Exhibit No. 34: Agreement between Woodward and Smelters Union dated November 11, 1939.—(R. 3916);

Sloss Exhibit No. 18 (the same as Exhibit "B" to Sloss petition):

V

BACKGROUND OF THE ACT — ADMINISTRATIVE INTERPRETATIONS OF PRIOR STATUTES CONTAINING THE WORD "WORKWEEK" OR WORDS OF SIMILAR IMPORT.

The long established and well known definition of the "workweek" as set forth above in the agreements between petitioners and their employees had been, previous to the enactment of the Act, sanctioned and adopted in the following, among other, official rulings and interpretations:

(1) An award of a Board of Arbitration presided over by Judge George Gray as the agreed umpire.

This Board held its sessions in Birmingham, Alabama, in *1903* for the purpose of settling differences existing between the Alabama coal mine operators and their employees, represented by the United Mine Workers of America. The arbitration resulted in the execution of a contract carrying the traditional "face to face" definition of the day's work with the exclusion of the traveling time.— (R. 2180).

Agreement between Sloss and Smelters Union dated September 11, 1940.— (R. 152);

T. C. I. Exhibit No. 20: Agreement between Tennessee and Red Ore Miners Union dated December 23, 1940.— (R. 3737).

Sloss Exhibit No. 36: Agreement between Woodward and Smelters Union dated December 30, 1940.— (R. 3939);

Exhibit "C" to Sloss Petition: Agreement between Sloss and Smelters Union dated March 17, 1941.— (R. 166).

(2) The United States Fuel Administration Agreement and Award of Arbitration Committee for coal mines in Southeastern Kentucky and Eastern Tennessee on *November 10, 1917*.

The arbitration was held under the direction of H. A. Garfield, United States Fuel Administrator, with Rembrandt Peale serving as umpire.—(Plaintiff's Exhibit No. 32, R. 4693).

(3) On *December 14, 1917*, on the recommendation of the United States Fuel Administrator the Alabama coal operators and the Mine Workers Union settled their disputes by accepting the award containing the definition of the day's work as agreed to in the Tennessee-Kentucky field and as set forth in (2) above.—(Plaintiff's Exhibit No. 31, R. 4695).

(4) The Report and Award of the Bituminous Coal Commission appointed by President Wilson to adjust matters in controversy between bituminous coal miners and operators of the country, a copy of which was transmitted to the representatives of the Alabama Coal Operators Association and of the Mine Workers Union by President Wilson on *March 19, 1920*, and agreed to by the parties.—(Plaintiff's Exhibit No. 46, R. 4696-99).

(5) The National Industrial Recovery Act enacted by the Congress on *June 16, 1933*, was the progenitor of the National Labor Relations Act and of the Fair Labor Standards Act. It provided for the adoption of codes for specific industries, the codes, when approved by the President, having the force of law.

The codes of fair competition thus became complete employer and employee charters, covering:

(a) Minimum wages and maximum hours, and

(b) The protection and maintenance of the rights of collective bargaining.

On *September 18, 1933* (R. 4700-1) President Roosevelt, following meetings and negotiations between the United Mine Workers of America and the various coal associations, their agreement on the code, its recommendation by the Deputy Administrator and its approval by the Administrator, approved the code agreed to by the bituminous coal industry.

This code completely covered all employer-employee relations, and provided in Article III, "Maximum Hours of Labor," that:

> "Seven hours of labor shall constitute a day's work, and this means seven hours of work at the usual working places for all classes of labor exclusive of the lunch period."—(R. 4705).

President Roosevelt gave his second approval to this well established definition of the underground miner's "day's work" when, in approving the Appalachian Agreement reached between the coal operators and the Mine Workers Union on *September 21, 1933*, he used the following language.

> "In approving this agreement it is with the understanding that the hours and wages and conditions of employment recited herein may also be applied to the employees who are not parties hereto and that the requirements of Section 7 (a) of the NIRA will be complied with in carrying out this agreement."—(R. 4786).

The Code of Fair Competition for the bituminous

coal industry remained in full force and effect until *May 27, 1935*, when this Court declared NIRA unconstitutional.*

After the invalidation of NIRA by the Supreme Court of the United States the Congress enacted the National Labor Relations Act and embodied in this Act permanent legislation regarding collective bargaining rights in substance the same as previously embodied in NIRA, and on *June 24, 1938*, enacted the Fair Labor Standards Act of 1938 which embodied the substantive labor provisions of NIRA in reference to minimum wages, maximum hours, and child labo

Representative Keller, a member of the Conference Committee, in debate preceding the final passage of the Fair Labor Standards Act, *June 14, 1938*, said:

"This bill eliminates the defects and preserves the best features of the National Industrial Recovery

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*The petitioners have always, in the operation of their iron ore mines, followed the methods and practices used in the operation of their coal mines.

A code for the iron ore mining industry was never adopted.

The petitioners, however, following their usual custom, adopted in 1933 the provisions of the coal code in reference to their iron ore mining operations and at this time announced to the representatives of the unions that the provisions of the coal code would be followed in the iron ore mining operations.—(R. 3591-93).

On May 26, 1936, the Smelters Union, in recognition of the essential similarity in the coal and iron ore mining operations, presented and requested the execution of a written contract which contained the exact definition which then prevailed and had for years prevailed in the union contracts with the coal mines throughout the country, namely:

"The eight hour day means eight hours in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period."—(R. 3629, 3632).

Act. In doing so a better procedure is provided, so that no rights may be affected without opportunity to be heard. NRA put down a floor for wages and a ceiling to hours of work."—(Vol. 83, Congressional Record, Part 8, p. 9264, 75th Congress, Third Session, June, 1938).

6. Beginning in the year *1898* the coal operators and the United Mine Workers of America in Alabama and elsewhere in the United States negotiated and executed wage agreements defining the day's work on the "face to face" basis and excluding "portal to portal" traveling time.[*]

7. Prior to the enactment of the Act the Congress and the legislatures of a number of the States had enacted health laws limiting hours of employment. The courts construing these laws, and those charged with their interpretation, administration and enforcement had uniformly ruled, in effect, that the hours of permissible labor excluded time spent in going to and from the place of work.[*]

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[*]Illustrative of these wage agreements see R. 4749-4842.

[*]*Ex Parte Martin*, (Supreme Court of Calif., 1909), 106 Pac. 235. Several of the western states adopted laws similar to the California statute after its construction by the Supreme Court of California. The States of Utah (Chap. 59, Laws of Utah, 1937), Arizona (Section 1958, Arizona Revised Codes, 1928), and Nevada (Section 10237, Nevada Compiled Laws), alone, adopted a different state policy and enacted, under police power, statutes which, in substance, provided that the period of employment in underground mines should not be more than "eight hours per day computed from the time the men go underground until they return to the surface." Plaintiff's Exhibit No. 16: 26 Opinions of Attorneys General 64. "Eight hour Law—Reclamation Service."—(R. 4646); Plaintiff's Ex-

VI

CONSTRUCTION OF THE ACT SUBSEQUENT TO ITS ENACTMENT BY THE PARTIES AND BY ADMINISTRATIVE AND ENFORCEMENT OFFICIALS

1. Petitioners and their employees (represented by strong national unions) and the iron ore mining industry throughout the United States continued, after the enactment of the Act, to operate on the "face to face" basis; this traditional concept of the day's work continued to be embodied in wage agreements; and the employees received thereunder increases in wages, additional pay through incentive plans, and other valuable considerations. Some of these agreements were executed as late as September 11, 1940, December 23, 1940, and March 17, 1941.—(See footnote 21, supra).

2. The national coal industry has continued to the present time to compute and pay wages on the "face to face" basis, either under collectively bargained wage

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hibit No. 17: 26 Opinions of Attorneys General 605, "Eight Hour Law—Hours of Service of Lock Tenders, Etc.—(R. 4654); Plaintiffs' Exhibit No. 18: 27 Comptroller of the Treasury 1060, "Traveling Expenses—Railway Postal Clerks"—(R. 4658); Plaintiffs' Exhibit No. 19: 9 Decisions of the Comptroller General 200, "Compensation—Extra Pay for Night Work, Railway Postal Clerks."—(R. 4661); Plaintiffs' Exhibit No. 20: 14 Comptroller General 907, "Compensation—Overtime—40 Hour Week."—(R. 4662); Plaintiffs' Exhibit No. 21: Opinion of the Attorney General of the U. S.—application of the Eight-Hour Law to Employees of the Civilian Conservation Corps.—(R. 4666).

agreements or directives of the government.* The number of employees in the coal mining industry exceeds 500,000.

3. The Administrator, with full knowledge of the constructions by the parties, administered the act in the iron ore mining industry on the "face to face" basis until he rendered his opinion on *March 23, 1941.*—(R. 76, et seq.). He had previously, on *July 27, 1940* (R. 4716) approved the "face to face" basis in reference to bituminous coal mines in words which could have left no doubt in the minds of any reasonable person that the same interpretation should and would be followed in the case of the iron ore mining industry.

4. The Attorney General, charged with the enforcement of the Act, has never sought to enforce the "portal to portal" interpretation in reference to underground iron ore or coal mines.

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*The wage agreements in the coal industry expired on March 31, 1943, and subsequent to the decision of the District Court in this case on August 13, 1941. Based upon such decision, the United Mine Workers of America demanded pay for "portal to portal" travel time, asserting such to be a legal requirement for the industry. Such demand was not made in the 1941 negotiations which took place prior to the District Court decision. This demand was implemented during the course of the 1943 contract negotiations by the decision of the Circuit Court of Appeals on March 16, 1943, six days after the start of negotiations.

This Court is requested to take judicial notice of the hearings before, and the decisions and directives of, the National War Labor Board in its Case No. 111-1284 involving the Coal Operators and the Mine Workers Union and in which the "portal to portal" question is of paramount importance. Since the rendition of the final decision in this case, several suits have been filed and are now pending in various District Courts of the United States seeking judicial construction of Section 7 of the Act in its application to underground coal miners in its relation to portal to portal compensation.

VII

THE CONGRESS DID NOT INTEND THE ACT TO BE CONSTRUED AND ADMINISTERED WITH REFERENCE TO THE VARYING CONDITIONS IN INDIVIDUAL PLANTS CONTRARY TO REASONABLE STANDARDS PREVIOUSLY ADOPTED BY CUSTOM OR AGREEMENT IN AN INDUSTRY.

1. The intention of the Congress that the Act should be administered on the basis of reasonable standards adopted by custom or agreement in an industry and not on an individual plant basis is demonstrated:

(a) By the fact that the National Industrial Recovery Act, the progenitor of the Act, was enacted and administered on an industry basis;

(b) By the Congressional debates upon the passage of the Act;

(c) By the context* of the Act;

(d) Because the constitutional base of the Act was the prevention of unfair competition in commerce.**

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*Section 5 (a) and (b) of the Act—"Industry Committees."

**Fair competition through the elimination of sweat shop conditions can only be secured by so administering the Act as to prevent a member of an industry from engaging in unfair competition with other members of the same industry. Unfair competition will follow if a "jury or other fact-finding tribunal" is allowed to ignore the general concept of the industry and to substitute therefor an individual judgment drawn from the facts of an individual plant.

United States v. Darby Lumber Company (Feb. 13, 1941), 61 Sup. Ct. 451, at p. 457.

2. The Administrator has administered the Act on an industry basis with full recognition that long existing customs and contractual relationships in a particular industry and "the general concept of work or employment" in such industry (on the part of those in position to know best and who have the most interest in the matter) were not intended by the provisions of the Act to be set aside.*

VIII

DECISIONS OF THE CIRCUIT COURT OF APPEALS

An analysis of the original opinion and judgment of the Circuit Court of Appeals, and the opinion and judgment rendered on petitioners' application for a rehearing, shows that the Circuit Court of Appeals:

1. Held that all the time spent underground (except the lunch period) is in and of itself work time. Otherwise stated, all time spent underground must be paid for as work without reference to whether the employee is being transported, is waiting for transportation, is walking, is resting, etc.

2. Based its decision on its application of facts on an

*This is strongly illustrated by the opinion of the Administrator (p. 24, supra) in reference to the coal mining industry, and by his opinion in reference to the metal mining industry, his opinion in the coal mining industry being correct both in his method of interpretation and his application of facts, while in the case of metal mining industry his method was correct and consistent, but his application of the facts by including the iron ore mining industry with the gold, silver, zinc and copper mines of the west, an entirely separate industry or industries, was erroneous.

individual or plant basis instead of on an industry basis.

3. Departed from its announced method of individual application by applying to all petitioners and their employees much evidence which applied to only one or more of petitioners, or to only some of their employees, and by ignoring evidence which clearly distinguished the case of some of petitioners or their employees from others.

4. Based its conclusion that all the time spent underground was in and of itself work on the predicate that the purpose of the Act was "to eliminate labor conditions detrimental to the general welfare of workers" and to "rectify abuses" growing out of the dangers and discomforts incidental to underground iron ore mining.

5. Either attached no importance to, or ignored, the undisputed evidence that in all petitioners' mines and in the iron ore mines elsewhere in the United States it had been, for a long time prior to the enactment of the Act, the established practice, embodied in contractual agreements, recognized and agreed to by all employers and employees, to pay wages on the "face to face" basis, and held that the Congress intended by the use of the word "workweek" to overturn the practice and annul the agreements.

6. Set aside as invalid wage agreements made between the parties not in evasion of the Act, but in reliance upon previous and existing interpretations and traditional practices.

7. Denied to the parties the rights of collective bargaining with reference to "portal to portal" traveling time.

8. Based its affirmance on the conclusion that the finding of facts of the District Court was not clearly erroneous, when the undisputed evidence was not only contrary to such finding, but the question of the field left open for bargaining and contracts was a matter of law, and not a question of fact.

9. Held that there did not exist a justiciable controversy between petitioners and the defendants in reference to the construction of Section 7 of the Act for the time subsequent to May 1, 1941 and refused to declare judicially the intent of Congress in reference to such time. The application of the Act to the time subsequent to May 1, 1941, is, at least, equally important as the period from the enactment of the Act to that date, and, indeed, is the only controversy between petitioner and the intervener-administrator.

Petitioners respectfully submit that in all the matters above set forth the Circuit Court of Appeals was in error.

CONCLUSION

It is respectfully submitted that, for the reasons stated, the petition for writ of certiorari should be granted.

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STATE OF ALABAMA)
JEFFERSON COUNTY) ss

Borden Burr, being first duly sworn, deposes and says that he is the attorney for the petitioners above named; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

Subscribed and sworn to before me this day of September, 1943.

Notary Public.

STATE OF ALABAMA)
JEFFERSON COUNTY) ss

I, Borden Burr, Attorney at Law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing Petition for Writ of Certiorari; that the same is not made for purposes of delay, and that in my opinion said petition is meritorious and well founded in law and ought to be granted and the Writ issued.

I further certify that I have personally given notice of the filing of the petition, together with a copy of the petition, supporting brief, and printed record by serving copies thereof on Crampton Harris and J. Q. Smith, Birmingham, Alabama, and Bessie Margolin, Assistant Solicitor, United States Department of Labor, Washington, D. C., counsel for respondents.

BRIEF AND ARGUMENT OF BORDEN BURR AND E. L. ALL, OF BIRMINGHAM, ALABAMA, AND R. T. RIVES OF MONTGOMERY, ALABAMA, IN SUPPORT OF FOREGOING PETITION.

I

PURPOSE OF THE ACT

The Circuit Court of Appeals, in effect,[1] held that all time underground was in and of itself a part of the "workweek" because it was the purpose of the Act to "eliminate" or "rectify" the incidental perils and discomforts of underground mining.

In the case of *United States v. F. W. Darby Lumber Company*, (February 23, 1941); 61 Sup. Ct. Rep., 451-63, construing the Fair Labor Standards Act of 1938, this Court said:

> "Its (the Act's purpose) as we judicially know from the declaration of policy in Paragraph 2 (2) of the Act, and from the reports of Congressional Committees proposing the legislation, is to exclude from interstate commerce goods produced for the commerce, under conditions detrimental to the maintenance of the minimum standards of living neces-

[1] Opinion of District Court, R. 568, 40 Fed. Supp. 4; Opinions of Circuit Court of Appeals, Appendix, pp. 64 and 77.

sary for health and general well being—and to prevent the use of interstate commerce as a means of competition in the distribution of goods so produced.

"The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the state from and to which the commerce flows. * * *

"As we have said the evils aimed at by the Act are the spread of sub-standard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced, with those produced under the prescribed or better labor conditions; and the subsequent dislocation of the commerce itself caused by the impairment or destruction of local business by the competition made effective through interstate commerce. * * *

"Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of not less than one and one-half the regular rate at which the worker is employed."—(pp. 455, 457, 461).

In the case of *Fleming v. Belo Corporation* (5th C. C. A., affirmed by this Court June 3, 1942, 66 Sup. Ct Rep. 1223), 121 Fed. Rep. (2d) 207, the Circuit Court of Appeals, after quoting from the Darby case, said:

"There is nothing here about spreading the work, nothing about penalizing overtime, nothing about abrogating the right of contract, nothing about requiring an employer to further raise wages already far above the sub-standard struck down and the minimum standard set up in the Act."

The opinion of the Court construing the word "workweek" as including all the time (except the lunch period) spent underground is repugnant to the purpose of the Act. The policy and purpose of the Act (power being derived from the interstate commerce clause of the Constitution) may be briefly stated to prevent:

(a) Sweat shop wages;

(b) Unfair competition in commerce, and

(c) By application of "financial pressure to avoid the extra wage and to assure workers additional pay to compensate them for the burden of workweek beyond the hours fixed in the Act."[2]

The evidence discloses that sweat shop wages did not exist in the iron ore mines. On the contrary the wages paid were far in excess of the minimum, were in keeping with fair compensation for the incidental perils and discomforts, were the result of collective bargaining, and took into consideration the time spent in traveling to and from the working place.

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[2] (a) and (b) above find their support in the case of *United States v. F. W. Darby Lbr. Co., supra.*, and (c) above in the case of *Overnight Motor Transportation Co. v. Missell*, 316 U. S. 572.

[3] Witness Ball, R. 850-51; T. C. I. Exhibit No. 8, R. 3604-11; Witness McBrayer, R. 2589; Sloss Exhibit No. 2, R. 4024-31, etc.

The inevitable result of the decision will be the restraint of interstate commerce instead of its protection and the causing, instead of the prevention, of "unfair competition in commerce."

The distances from the portal to the working places vary in all underground iron ore mines; some are shallow, some are deep. Previous to the enactment of the Act the wage scales were based, and wages were paid, in all underground iron ore mines, on the "face to face" basis. Changing to the "portal to portal" basis gives to competitors having shallow mines an unfair advantage over competitors having the deep mines; raises the relative production costs in the mines with longer travel time; and less overtime compensation is paid, reduces the relative production of the mines having longer travel time.

A striking illustration of this is found in the undisputed evidence in this case. Republic, a competitor of the other petitioners, operates its Spaulding Mine within a comparatively short distance of the mines of the other petitioners. This mine is so near the surface that no mechanical transportation is used, and the underground employees, in walking from the surface to their places of work, and returning, consume a maximum of fifteen minutes.[1] Some of the mines of the other petitioners, located on the same mountain, by reason of the depth of the slopes and the location of the ore, require the men, in order to reach their places of productive work, to use mechanical transportation to the underground loading stations and to walk from

[1] Witness Thompson, R. 1908-12; Map of Spaulding Mine, R. 4022.

there to their working places. The time thus spent in traveling is, in some instances, a maximum of one and one-half hours as compared with the fifteen minutes in the Spaulding Mine. This illustration is typical of underground iron ore mining operations in Alabama and throughout the United States. The same inequalities, in a marked degree, exist as between all the mines, and within each mine.

When the Congress enacted the law it must be assumed to have had knowledge of these general conditions, and, certainly, it did not intend, in the passage of an act having as its principal purpose the prevention of unfair competition, to destroy the uniformity which had always existed of paying and computing wages on the "face to face" basis, and thereby to establish unfair competition by reason of the total lack of uniformity which would follow the computation and payment of wages on the "portal to portal" basis.

Not only is the decision contrary to the expressed purpose of the Act, but it is grounded by the Circuit Court of Appeals on a statement of the purpose of the Act which, petitioners respectfully assert, is diametrically opposed to the intent of the Congress in its enactment. The Court states:

> "It may be conceded, *arguendo,* that for twenty-five years prior to 1938 iron-ore miners had not been compensated for travel-time, and that even after 1938 the parties to this suit had entered into contracts whereby it was agreed that no wages should be paid for travel-time; but the very purpose of the Fair Labor Standards Act was to eliminate labor con-

tions detrimental to the general welfare of workers, and the remedial machinery set up to accomplish that purpose regulated hours of work and rates of pay. Industrial custom does not warrant the continuation of abuses that the Act was created to rectify; and no contractual agreement that compensation should not be paid for travel-time is valid if in conflict with the Act."—(Appendix, p. 69).

The bedrock of the Court's decision is the alleged existence of "abuses" and of "labor conditions detrimental to the general welfare of the employees" growing out of the dangers and discomforts incidental to underground iron ore mining, and the Court holds, in effect, that it was the purpose of the Act to eliminate "these and similar abuses" and "labor conditions detrimental to the general welfare of the employees."

It was not the intention of the Congress to police the many industries for perils and discomforts. It was the intention, by the imposition of economic standards, to prevent unfair competition in commerce by eliminating the competitive advantage of sub-standard wages detrimental to the maintenance of a minimum standard of living. The term "standard of living" is a phrase of economic import, and, as shown by the decisions of the courts and by the debates in Congress, has a definite meaning which relates, not to general conditions of employment or working environment, but to the question as to whether the wages which are being received are sufficient to enable the employees to enjoy a decent "standard of living."

The decision is in error in holding that the Act was

intended to "eliminate" or "rectify" the general conditions of employment or working environment. The payment of the minimum wage provided in the Act and the payment of overtime was not intended, and does not serve, to "eliminate" or "rectify" such conditions of employment. The institution of "portal to portal" leaves the perils, discomforts and labor environment of the employees unchanged, both while working and while traveling to and from work.

The lack of logic in the decision is demonstrated by its holding that lunch time spent among the alleged perils near the working place is not work, but the time spent waiting for the transportation, at the underground loading station, electrically lighted, with comfortable seats, etc., is work.—(T. C. I. Exhibit 22, R. 3750).

II

THE CONGRESS DID NOT INTEND THE ACT TO BE CONSTRUED AND ADMINISTERED WITH REFERENCE TO THE VARYING CONDITIONS IN INDIVIDUAL PLANTS CONTRARY TO REASONABLE STANDARDS PREVIOUSLY ADOPTED BY CUSTOM OR AGREEMENT IN AN INDUSTRY.

The Circuit Court of Appeals in its application of Section 7 of the Act to the underground employees of petitioners places each employee's "portal to portal"

time on an individual basis and contrary to the intent of the Congress ignores the reasonable standard adopted by the industry.

The National Industrial Recovery Act (the progenitor of the Act and of the National Labor Relations Act) , was expressly predicated on an "industry" basis, and its administration and enforcement depended upon codes of fair competition for industries.

The decision in this case ignores the fact that the Congress intended that the working time in each in-

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We quote from the concurring opinion of Wayne L. Morse, rendered on June 17, 1943, in the Matter of Operators Negotiating Committee, Appalachian Joint Conference and Southern Appalachian Joint Wage Conference and United Mine Workers of America, Case No. 111-1284 before the National War Labor Board:

> "It should not be overlooked that the President of the United Mine Workers of America has rested his claim to portal to portal travel time pay on the theory that the Mine workers are entitled to such pay as a legal right. He has cited the decision of the Fifth Circuit Court of Appeals in the *Tennessee Coal, Iron and Railroad Case*, decided March 16, 1943, in support of this contention. However, Mr. Lewis' demand in fact has not been for the actual travel time spent by the individual miner underground, but for an adjustment of travel time pay to be distributed in an equal amount to all the Mine Workers, including those above and below the ground, irrespective of whether the individual Mine Worker actually travels underground.
>
> "Thus, Mr. Lewis' demand has not been for compensation for any legal claim that the individual miners may have, but rather, it is a demand for a wage increase for all the miners in excess of the wage stabilization policies of the Board couched in terms of portal to portal pay. It is a demand for a form of payment which could not possibly be collected under the Fair Labor Standards Act, because the very decision which the representatives of the Mine Workers cite makes clear that the portal to portal travel time pay allowed in that case is individual to the employee who travels underground in accordance with the time which he actually travels."

dustry should be as defined by the reasonable practices, contracts and concept of the industry.

Representative Keller, in debate preceding the final passage of the Act, stated:

> "National standards alone are essential to fair competition. The present unregulated system is productive of competitive advantages and disadvantages. A manufacturer who pays $5 for $5 worth of work in New England, in the South, or in the West, is entitled to protection against his competitor who pays less than $5 for $5 worth of work. The employee who performs $5 worth of work in Pennsylvania, Alabama, or Illinois, is entitled to the value of his work."—(Vol. 83, Congressional Record, Part 8, p. 9264).

It is obvious that under the decision Tennessee and Sloss in some of their mines, for the same wage, will receive approximately six hours of productive work for which their competitor, Republic, at its Spaulding Mine, will receive approximately eight hours of productive work.

The Act provides, and has been so construed and administered, for the grouping of industries with appropriate regard to established customs and contractual relationships between employers and employees in the various industries.

The Intervener-Administrator fully recognizes that the Act should be administered on an industry basis. In reaching his opinion in this case the intervener interpreted the Act on an industry basis, but was incor-

rect in grouping the iron ore mining industry with what he designated the "metal mining industry." The gold, silver, copper and other non-ferrous mines have never been connected with or related to the iron ore mining industry; they are located, for the most part, in parts of the country where there are few, if any, iron ore mines; they follow different practices; and, most important of all, they do not come into any kind of competition with the iron ore mining industry or the manufacture of products of which iron ore is the principal ingredient.*

Petitioners respectfully submit that it was the intention of the Congress to have the word "workweek," in its application to the iron ore mining industry, applied in accordance with the existing facts, conditions, customs and contracts of that industry.

As stated by this Court in the case of *United States v. Isham*, 17 Wallace 496, 507:

> "The words of a statute are to be taken in the sense in which they would be understood by that public in which they are to take effect."

The decision of the Circuit Court of Appeals ignores the undisputed proof that at and prior to the time of the enactment of the Act employers and employees, unions and mine operators, administrators and interpretors of the Act, and of similar legislation, and the

*The War Labor Board has, since the decision, followed common knowledge by recognizing non-ferrous mining industry as a separate, distinct industry.—(Case of Non-Ferrous Metal Companies, 11 L. R. R. 278—Establishment of Non-Ferrous Metal Commission, 11 L. R. R. 513).

Congress, in the prior enactment of laws of similar purpose and content, had all recognized the established practice of defining the workday on the "face to face" basis.

III

THE TERM "WORKWEEK," UNDEFINED IN THE ACT, REQUIRES INTERPRETATION

Section 7 of the Act, in all its provisions, is intended by the Congress for universal application to all employers and employees engaged in commerce, or in the production of goods for commerce, regardless of whether the work is performed on the surface or underground. If there is any basis for a difference of opinion as to its application to a particular act or activity of any employee or group of employees, or to any industry or group of industries, then the process of interpretation is absolutely necessary. The fact alone that the Act provides for an Administrator with duties of regulation and enforcement bespeaks the necessity of interpretation in the matter of its application.

The fact that numerous bulletins have been released, and their contents evidencing the process of interpretation in the application of the word "workweek" in various fields, shows the necessity. Many of these releases, as illustrated by bulletins with respect to the matter with which the parties are here concerned, demonstrate that the Administrator is uncertain and indecisive as to the proper application of the pertinent provisions of the Act. Difficulty or uncertainty in

particular application renders interpretation essential.

Particular attention is invited to some of the expressions used by the Administrator in some of these releases:

> "We are not yet disposed to take any particular position as to whether the half hour spent eating lunch underground may be deducted from hours worked. The problem is a very difficult one because the employee is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating. On the other hand, we recognize that the employee does have time off in order to have lunch and an argument can be made that such time need not be considered as hours worked. But, as I say, the Division is not prepared at the present time to make any definitive determination on this question."—(R. 397-398, 403-404):

The need of interpretation is clearly and definitely shown by the Administrator when he states in his Modified Portal to Portal Wage Hour Opinion:

> "that because the Division had not heretofore taken a definite stand on the various problems involved, it would not seek to compel the payment of restitution from mine owners who have been operating on a face to face or other bases inconsistent with the principles outlined in the report."—(R. 78).

It would be difficult to conclude that the process of interpretation is not here needed in the face of the uncontradicted evidence that from time immemorial

until the rendition by the Administrator of his Modified Portal to Portal Wage Hour Opinion it had never been considered or suggested by any one that traveling time should be included as a part of the "workweek" in underground iron ore mines.

IV

APPLICABLE RULES OF STATUTORY CONSTRUCTION

In interpreting the term "workweek" as used in the Fair Labor Standards Act, the intention of the Congress must be determined. In finding that intent consideration must be given to:

(a) The reasonable standards in the industry to which the Act is sought to be applied, as evidenced by prevailing working conditions, practices, and bona fide wage agreements between employers and employees by which working time is defined;

(b) Reasonable standards in other industries in which working conditions, practices, and bona fide wage agreements between employers and employees are essentially the same as in the industry under consideration;

(c) The sense in which the same term, or terms of the same import, have been used in prior federal statutes;

(d) The rulings or opinions of administrative officers in construing terms of like import in prior federal statutes;

(e) Prior and subsequent practices and rulings of administrative officers charged with the administration of the statute or similar statutes;

(f) The practical construction of those for whose benefit the statute was enacted; and

(g) The generally accepted meaning of the same term, or terms of the same import, as evidenced by the use of such term, or terms, in state statutes relating to hours of work, the judicial interpretations of such terms, and practices thereunder by those to whom they apply.

The above is a shorthand rendering of the decisions of the courts in the following cases:

United States v. F. W. Darby Lumber Company, (February 13, 1941), 61 Sup. Ct. 451-63;

United States v. Irwin, (April 6, 1942), 62 Sup. Ct. 899;

Interstate Commerce Commission v. Baltimore and Ohio Railroad Company, 145 U. S. 263;

United States v. Farrar, 281 U. S. 624;

Reiche v. Smythe, (1872), 13 Wallace 162; 20 L. Ed. 566;

Mark v. United States, (1896), 161 U. S. 297; 17 S. Ct. 476; 40 L. Ed. 706;

Chicago v. Sheldon, (1870), 9 Wall. 54; 19 L. Ed. 594;

Stairs v. Peaslee, (1855), 18 Howard (U. S.) 521; 15 L. Ed. 474;

National Lead Company v. United States, 252 U. S. 140;

United States v. Isham, 17 Wallace 496-507; 21 L. Ed. 729;

United States v. Turner Turpentine Company, (C. C. A. 5th, 1940), 111 F. (2d) 400;

McDonald v. Hovey, 110 U. S. 619;

Ex Parte Martin, (Cal. Sup. Ct.) 106 Pac. 235.

It is undisputed that at the time of the enactment of the Act the "face to face" basis of paying wages had existed for many years and had become the established custom; that this traditional custom had been embodied in bona fide wage agreements between petitioners and their employees; that these same conditions had likewise existed in the other underground iron ore mines in the United States and in the underground coal mining industry.

It is also a fact that language of the same import as here under consideration, in reference to the same subject matter and having in view the same purpose, had been used by the Congress in the enactment of the National Industrial Recovery Act.

In the case of *United States v. Irwin*, supra, this Court applied the rule as to the interpretative effect of a prior statute upon a subsequent act—saying:

"The question before us therefore is whether the construction of the library was a 'public work' as that term is used in the Miller Act. We think that it is, that the Assistant Secretary of the Interior was consequently authorized to require respondents to post a bond. * * *

"No aid in ascertaining the meaning of 'public

works' is to be found in the Miller Act itself. But in the National Industrial Recovery Act, passed two years before the Miller Act Congress defined it as including 'any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public'."

The Congress having, in this Act, substantially re-enacted the wage and hours of service provisions of NIRA, with the same purpose in view, and using substantially the same terms, must be presumed to have been familiar with the construction of those terms by the President, the Administrator, and the parties affected, and not having indicated in the Act any contrary intent, must be presumed to have adopted the congressional, executive and administrative interpretation of NIRA.

United States v. Farrar, supra.
Interstate Commerce Commission v. Baltimore and Ohio Railroad Company, supra;
Reiche v. Smythe, supra,

We call the Court's attention to the case of *United States v. Turner Turpentine Company, supra,* (U .S. Circuit Court of Appeals, Fifth Circuit) where the Court, in applying this rule of statutory construction. said:

"It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be re-

garded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress, in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor,' it must be considered that it used the term in a sense and intended it to have meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates. This does not mean, of course, that a mere local custom which is in the face of the meaning of a general term used in an act, may be read into the act to vary its terms. It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to."

It is also undisputed that employers and employees in the iron ore mining industry and the coal mining industry, all beneficiaries of the Act, and the Administrator (until March 25, 1941, and, in the coal mining industry until the present time) in every respect construed the Act as indicating the intention of the Congress to adopt in its enactment the long established practice and the contractual construction.

Not only did the defendant employees here continue their daily lives, receive their daily wage, accept the

benefit of job evaluations on a higher wage basis, receive and retain increases in wages[1] and other valuable consideration, but they carried forward, after full negotiation, in express written wage agreements, the previously established "face to face" definition of the work day.

The decision states that the workers vainly insisted upon their right to be paid for travel time, and intimates that, for this reason (in addition to the one assigned that the contracts were invalid because in conflict with the Act), the wage agreements should be received with suspicion.—(Appendix, p. 69).

There is no evidence supporting this intimation. On the contrary, it is undisputed that in the negotiations leading to the execution of the 1940 contract of the Union with the Tennessee Company the Union had the benefit of the following advisors: Lee Pressman, its general counsel; James Lipscomb, its Birmingham counsel since 1933 (Mr. Pressman and Mr. Lipscomb being counsel of record in this case), Reid Robinson, its International President, and the presidents and other officers of the Alabama locals (many of whom were witnesses in the instant case).—R. 2715-18). The Union was represented by its top officials in the negotiation and execution of other contracts.

In this connection it is to be remembered that the United Mine Workers of America, in some respects

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[1]Employees received wage increases since 1934 (there were other increases before), all based on eight hours "face to face," basis, in 1934, 1936, 1937, 1940 and 1941, all as the result of collective bargaining.—(R. pp. 1794-96).

the most powerful labor organization in America, either did not try or failed to change a "face to face" policy to a "portal to portal" policy in the bituminous coal mining industry. It must follow, therefore, that any failure (if an attempt was made) to effect a change from the "face to face" policy to the "portal to portal" policy did not result from inefficient representation.

The evidence is also undisputed that the Union never suggested or requested the payment of full traveling time until October, 1940, and that the last time it had ever suggested or requested pay for one-half traveling time was June 13, 1935.

The record also discloses that the Union was sufficiently strong in 1934 and 1936 to close down by strikes all petitioners' iron ore mining operations (R. 869-74, 884); that when it executed the Tennessee 1938 contract, as a part of the consideration for its execution, it received not only increased wages but an agreement re-employing approximately 100 former employees with reimbursement for back wages amounting to approximately $100,000.— (R. 2295).

In this connection we quote from the opinion of the Circuit Court of Appeals, Fourth Circuit, in the case of *E. I. duPont de Nemours and Co. v. National Labor Relations Board*, 116 F. (2d) 388, at page 398:

> "We are of the opinion that the labor group is now quite aware of its statutory rights, and is instilled with an aggressive spirit that, before the passage of the Act, may long have been kept dormant. The still picture of a sheep-like body of laboring men, placidly led by a dominating employer, is not rep-

resentative of the true situation. Since the passage of the Act, the picture has been quite effectively streamlined. We see today a mobile labor force, strengthened by statutory safeguards, working on comparatively even terms with the employer, who may often owe his particular strength to a superior economic, educational and social position. Under this view of the modern industrial situation, we surely cannot indulge in any assumption of weakness on the part of the employee; certainly we can not vary the specific terminology of the Act to meet these alleged weaknesses.'"

V

FREEDOM OF CONTRACT

It was not the intention of the Congress to restrict freedom of contract beyond the necessary purpose of preventing unfair competition in commerce. Likewise, the Congress did not intend to restrict the rights of collective bargaining which it has shown a zealous and consistent purpose to preserve and maintain.

"The District Court, in its opinion (R. 494, 40 Fed. Supp. 4), cited in support of its statement of lack of equality in bargaining the decision of this Court in the case of *Holden v. Hardy*, 159 U. S. 366 at page 397. This case was decided February 28, 1898.

It is also interesting to note that the State of Utah, whose hours of labor statute was under consideration in the Holden-Hardy case, subsequently found it necessary, in order to adopt a new legislative policy (Chap. 59, Laws of Utah, 1937), expressly provided that the period of employment in underground mines should not be more than "eight hours per day computed from the time the men go underground until they return to the surface."

This Court has indicated its intention in the construction of the Act to preserve the freedom of contract. In the case of *Williams v. Terminal Company*, 315 U. S. 386, the Court held, (though in the absence of contract tips were not wages but gratuities to be retained by the employee), that the employer and employee were free by contract to agree that tips constituted wages under the provisions of the Act. The Williams case is especially significant here because there this Court held that a contract, treating tips as wages arose from the publication of an order by the employer to that effect, and the action of the employees in continuing to work in the face of the order. In the case here we have ratification not only by continuing to work, but continuing to work under an express contract negotiated under full bargaining processes establishing wage rates on a "face to face" basis.

This Court also recognized freedom of contract in the case of *Walling v. Belo Corporation*, 316 U. S. 624. In that case this Court used the following language:

> "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an

inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of a steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected."

The dissenting opinion of Judge Sibley (in the present case) correctly construes the Act by not denying freedom of contract, and in holding that the contracts made here were valid. The decision overruling the application for rehearing recognizes the principle of freedom of contracts, but reaches an erroneous conclusion in stating:

"We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as matter of law, or as denying the principle that in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually affected. The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal. We have expounded no rigid definition of working time.—Appendix, p. 89).

We respectfully submit that the opinion does lay down "a rigid definition of working time," and does "uphold the portal-to-portal theory as a matter of law," not only in application to these petitioners, but as a judicial precedent to all other underground mines hav-

ing similar conditions. It says, in effect, that all time spent underground, exclusive of the lunch period, is working time. If it does not so hold, it has failed to answer the question presented by the petitions in this case for declaratory judgments. The Administrator, in his opinion, stated, and the defendants, pursuant to that opinion, contended, that all underground time except lunch time was working time. Petitioners sought a judicial declaration of the law as to this controversy. They did not deny that any portion of underground time spent at work should be computed as working time, but insisted that time consumed in traveling, or walking, or waiting for transportation was not intended by the Congress to be work time in the face of the established practice and the terms of the wage agreements existing at and prior to the enactment of the Act.

The decision refers the evidentiary value of the established practices and of the wage agreements to the "jury or other fact-finding tribunal." It gives no consideration to the evidentiary value of the established practice and the existing wage agreements as essential factors in arriving at the intent of the Congress.

The original opinion states:

"No contractual agreement that compensation should not be paid for travel-time is valid if in conflict with the Act."

The opinion on rehearing states:

"The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal."

The first statement, we submit, is sound, and the second statement is in error. Necessarily the field left for the operation of contracts as to what constitutes working time is uniform in every case and in every part of the nation. That question can not be left to the varying determination of each separate jury or fact finding tribunal. On the same evidence one jury might return one verdict and another jury an opposite verdict, and neither verdict could be set aside "if different reasonable inferences may fairly be drawn from the evidence." Each varying decision tends to increase "unfair competition in commerce." Such chaos and confusion can be avoided only by holding that the validity and effect of such contracts are matters of law for the courts to decide.

The employer-employee relationship is founded in contract. Work is what the employee is paid to do. It is conceded by the decision that the Act does not require that the employee be paid for lunch time in the mine nor for traveling time to and fro between the mine and the bath (change) house, but that the parties are at liberty to agree either that such time is work time or that it is not, and if work time, to agree upon the compensation to be paid therefor.

What then is the boundary line between instances where the parties may agree as to what constitutes work time to be paid for as such and cases where such agreements are in conflict with the Act? The Act applies to employees who are engaged in commerce or in the production of goods for commerce. The employees here involved were engaged in the production of goods for commerce. Section 3 (j) of the Act defines when an

employee is so engaged. Any contract which would exclude from work time to be paid for, time spent in the actual production of such goods, or, as in this case, in the mining and handling of the ore, would defeat the purpose of the Act and hence would be void. On the other hand, to hold that parties can not agree that compensation shall not be paid for travel time, or that the effect of such an agreement is an evidentiary question for the jury, tends to defeat the purpose of the Act and to promote unfair competition, because the amount of time necessarily spent in traveling to and from the place of actual production varies widely between different places of employment. As said in the dissenting opinion, "There is nothing in the Act to out-law agreements that travel time in getting to and from the agreed place of work is not work time."

Treating the validity of agreements in relation to working time as a question of fact, with their evidentiary value to be determined by the jury, the Court has held that if the ordinary man might fairly have drawn the inference from the evidence that time for which the parties agreed no compensation should be paid was in fact work time, then such finding should not be set aisde. If the validity of agreements as to working time is treated as a matter of law, the conclusion is diametrically opposite — the non-pay time must be clearly work time or the agreement is valid and effective.

To treat the validity of agreements in relation to working time as questions of fact to be determined by a jury leads to confusion which would inevitably arise from the possibility, or even probability, of contrary

conclusions. To treat the validity of agreements in such relation as questions of law results in uniformity of conclusions, and insures stability of economic relationship and conditions.'

The Act was intended to have application for a permanent period of time and on a national scale. To operate successfully for the future, the parties must be free to contract as to any time that is not clearly work time. What is not clearly work must be left subject to the contract of the parties.

The Act has large economic significance. In putting a floor under wages per hour it would protect large numbers of unorganized and underpaid employees not yet protected by the process of collective bargaining. In putting a ceiling, though a somewhat elastic ceiling, above the number of hours per week, it would spread employment among as many employees as practicable. Both the minimum wage and the maximum hour provisions would tend to increase purchasing power among those who would exercise that power and thereby would increase the demand for goods and bring about increased production to the benefit of employers as a whole and of the public generally. Such

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'The suit brought (Aug. 31, 1943) by coal mining employees of Tennessee Company as a class action for all employees who are members of the United Mine Workers of America is an action at law in which recovery is sought for each employee for overtime compensation covering traveling time. Under the decision here under consideration, we respectfully submit, if the "evidentiary value of the agreements in relation to working time is for the jury," the jury in the case above referred to will be given the right to determine what constitutes work in the coal mines of the Tennessee Company and the validity vel non of any agreements in respect thereto. We respectfully submit that this can not be the law.

benevolent purposes of the Act would fail of accomplishment if the burdens of the increased wages should fall unequally upon employers engaged in the same industry. The Act was intended to protect rather than to penalize the employer who paid his employees in excess of the minimum wages and worked them for less than the maximum hours. The Act looked beyond the individual employer and employee to the industry as a whole, to the consumer and to the public generally.

The rule enunciated by the Court is, we submit, much too narrow to be applied to an Act having such broad economic operation. That rule seems to be that the employer must pay wages whenever the employee is subject to his order or control. Applied to its logical conclusion, it would seem to include the lunch hour also, for the employee must eat his lunch within the mine and to some degree is subject to the employer's control. It would include all the time that the employee is required to be on the employer's premises. It would include (as was the original contention of defendant unions) all the time spent in the bath house changing clothes. That rule fails to distinguish between purposes and degrees of control. At times the control of the employer is slight and is simply for the purpose of safeguarding his employees;* at other times the purpose is to produce the goods to be sold to the

*The undisputed evidence in the instant case shows that the employee while riding the skip in and out of the mine was subject to safety rules but was never under the direction of and was not accompanied by his supervisor.—(R. 1305, 1381, 1387, 1949-50 and 3750).

consumer. The rule or standard applied by the Court of Appeals does not look beyond the individual employer and the individual employee. The true rule, we submit, looks to a passing on of economic benefits. The consumer purchases the goods and pays the employer for the goods produced. The employer in turn must pay the employee for work going into the actual production of those goods. He may pay the employee for his time in getting to and from the place of production, in gathering his tools and equipment, and other time preparatory to entering upon or leaving the process of production of goods. That, however, is a matter of contract between the parties."

"The extent to which this principle of the validity of agreements being a question for the determination of the fact finding tribunal can be carried is illustrated by the tribunal of the Administrator, since the judgment in this case was rendered by the District Court, in the case of *Walling, Administrator v. Gulf States Paper Company*, now pending on appeal in the Circuit Court of Appeals for the Fifth Circuit. In that case the Administrator contended that, under this decision, the time spent by woodcutters, for their convenience, in riding in employers' trucks from their homes to the woods was work time notwithstanding the established custom for years and the contracts between the parties were to the contrary.

The Administrator, in a recent ruling has held that time spent by the employees in changing clothes under uncomfortable conditions due to temperature, etc., was work time without any consideration being given to previous custom and existing contracts.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *Skidmore v. Swift and Company* (in Mss.) has recently sustained an agreement between the employer and employees that the employees would stay in the fire house of the employer during the night and should receive compensation only for the time actually consumed in answering fire calls.

These rulings and decision illustrate the difficulties and complexities which will arise if this question is left for the determination of "juries or other fact finding tribunals."

Petitioners respectfully submit that the decision interferes with the right of collective bargaining. Under the rigid definition of working time as given by the decision the parties are deprived of the opportunity to validly contract in reference to the method of computing and paying wages in underground iron ore mines.

In the case of *Fleming v. Belo Corporation*, supra, at page 214, the Circuit Court of Appeals for the Fifth Circuit said:

> "Freedom of contract, within constitutionally valid limitations, is, in the United States of America, one of the fundamental freedoms and this is particularly so in regard to labor relations. When, then, it is contended as here, that a statute has cut off or limited this freedom, a litigant must point to something more than his opinion that it ought to be cut off or limited, must point to language clearly and validly so providing. There is no more authoritative principle in the field of labor law than that, subject of course, to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours, and work conditions are the proper subject of contract between employer and employee and their agreements must be, and are, given full effect in the courts."

If the incubus of the judicial precedent of this decision is removed and the parties having the most interest, the greatest knowledge and the longest experience in underground mining are permitted to nego-

tiate and reach an agreement on the question of traveling time compensation, the chaos which, as predicted by Judge Sibley in his dissenting opinion, has occurred, would terminate.

VI

THERE EXISTS A JUSTICIABLE CONTROVERSY BETWEEN PETITIONERS AND DEFENDANTS IN REFERENCE TO THE CONSTRUCTION OF SECTION 7 OF THE ACT FOR THE TIME SUBSEQUENT TO MAY 1, 1941.

Petitioners were as much concerned with the construction of the law for the time after May 1, 1941, (the time when petitioners, under the compulsion of the Administrator's ruling, put into effect the "portal to portal" basis of computation and payment of wages) as for the time before.

The facts with reference to this are undisputed. They are not denied or even referred to in either the judgment and opinion of the District Court, or of the Circuit Court of Appeals.

The potential liability for unpaid wages since the effective date of the Act is tremendous and represents a complete windfall to the employees who not only did not expect payment for travel time, but who had expressly contracted that they would not claim payment therefor.

However, the determination, if sustained, adds millions of dollars each year in the future to the cost of petitioners' business.

The undisputed evidence shows that there existed an actual justiciable controversy between the petitioners and the underground employees, and between petitioners and the Administrator,[3] not only as to prior but as to future time; that, under the compulsion of the Administrator's opinion and employees' announced (and pleaded) intentions, petitioners changed to the "portal to portal" basis, at great expense, cost, and loss of production. A judicial declaration was required and requested as to whether or not traveling time was it and of itself a part of the "workweek."

This judicial inquiry the decision failed to answer, and confined its answer to the time prior to May 1, 1941. It predicated this answer on the employees "reporting to the portal," there depositing "their identification checks;" there boarding the conveyance (provided by the company for transportation) coated with grime of the mine" and riding in a "crouched position;" on the danger of "uninsulated wires," and because of instruction and supervision at the portal, etc.[4]

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[3]This was the sole controversy with the Administrator, as set up in his answer.—R. 301). As stated by him in evidence: "I intend to follow the interpretation in question, unless otherwise directed by the authoritative rulings of the court or unless I shall subsequently decide that my prior interpretation is incorrect."—(R. 384).

[4]In some of petitioners' mines, and as to some of the employees in all the mines the employees did not "report to the portal;" in some of the mines there was no "depositing of identification checks," or "boarding of conveyances," or riding in "a crouched position," or "danger from uninsulated wires." The lower court pooled all of the evidence without regard to its application, to parties or mines, but if such had been the evidence as to all the parties and all the mines of all petitioners, and all the employees, these conditions could have been eliminated for the future.

Every one of these basic conditions can be eliminated at much less cost than compliance for all time with the judgment.

Declaratory judgment proceedings are most helpful in permitting parties to conduct themselves in the future with a minimum of damage on account of uncertainties as to their rights under statutes of uncertain meaning.

VII

THE CIRCUIT COURT OF APPEALS ERRED IN ITS APPLICATION OF EVIDENCE

We are not disposed in a brief supporting a petition for a writ of certiorari to discuss the evidence in relation to the findings of the Courts below. We respectfully assert, however, that if and when the writ is granted it can and will be demonstrated by the record in this case that the finding of facts as made by the District Court, and relied upon by the Court of Appeals, is in substantial and determinative matters contrary to the undisputed evidence, and also that the decision was reached by applying to all the petitioners and their employees much evidence which applied to only one or more of the petitioners or to only some of their employees.

CONCLUSION

We respectfully request that the petition for the writ of certiorari be granted.

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APPENDIX

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT RENDERED MARCH 16, 1943.

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 10278

TENNESSEE COAL, IRON & RAILROAD COMPANY,
Appellant,

versus

MUSCODA LOCAL NO. 123, Etc., Et al.,
Appellees.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
Appellant,

versus

SLOSS RED ORE LOCAL NO. 109, Etc., Et al.,
Appellees.

REPUBLIC STEEL CORPORATION,
Appellant,

versus.

RAIMUND LOCAL NO. 121, Etc., Et al.,
Appellees.

Appeals from the District Court of the United States for the Northern District of Alabama.

(March 16, 1943)

Before SIBLEY, HOLMES, and McCORD, Circuit Judges.

HOLMES, Circuit Judge: These appeals are from a judgment declaring that the working time of underground iron-ore mining employees, comprising the work-week of such employees under Section 7 of the Fair Labor Standards Act of 1938,[1] includes time spent by them on the surface in checking in and out, obtaining and returning tools, lamps, and carbide, and time spent underground from the time they are required to report at the portal of the mine until they emerge therefrom at the end of their shift, less the fixed lunch period during which the employees are relieved of all duties; and declaring further that, since such aggregate working time exceeded the maximum work-week provided by said Act, appellants violated the Act in not compensating the employees as therein provided.

Appellants, corporations principally engaged in mining iron ore, filed separate civil actions under the Declaratory Judgments Act,[2] which were consolidated for trial, and as to which a single judgment was entered without objection. The actual controversy underlying federal jurisdiction related only to the hours of employment during the time intervening between the effective date of the Act, October 24, 1938, and the dates the respective petitions were filed in April, 1941. Upon a pre-trial conference it was agreed that the primary issue was what constituted the working time that made up the work-week of the underground ore-mining employees within the meaning of Section 7 of the Fair Labor Standards Act.

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[1] 29 U. S. C. A., Sec. 207.

[2] 28 U. S. C. A., Sec. 400, 52 Stat. 1060.

Section 7 of the Act requires every employer to pay overtime wages to any employee that is engaged in commerce or in the production of goods for commerce for a work-week longer than 44 hours between October 24, 1938, and October 23, 1939, longer than 42 hours between October 24, 1939, and October 23, 1940, and longer than 40 hours thereafter. The Act defines the word "employ" to include "to suffer or permit to work." It is without dispute that, during the period involved in this suit, each employee represented by appellees was engaged in the production of goods for commerce, and that each appellant required its underground employees to work 40 hours each week at their regular working places in the depths of the mine. Whether, in addition thereto, such employees were entitled under the Act to have included in the computation of their work-week the time consumed each week in traveling from the portal of the mine to their regular working places, and in returning therefrom to the portal at the end of the shift, plus the aggregate of the time consumed each week by such employees in checking in and out and obtaining and returning lamps, carbide, and tools on the surface, or whether they were entitled to have any part of such time included in the working time comprising the work-week, is the precise question for decision.

The Act was drafted for application on a national scale, and it does not undertake to define what is working time in any particular industry or class of industries. What constitutes working time is a question of fact depending upon the particular circumstances, and is a matter for the determination of the courts in con-

troverted cases. In the great majority of instances no question of this nature will arise, but in doubtful cases such as this the issue must be determined in accordance with common sense and the general concept of work or employment; and, as in other cases, the appellate court is controlled by the rule that the finding of the trial court upon decisive questions of fact must be upheld unless it is clearly erroneous.

There is no real dispute as to the facts upon which the travel-time question turns, but different inferences as to the working time may fairly and reasonably be drawn from these facts. The parties on both sides of this controversy petitioned the court below to decide the controverted issues between them, i.e., to find the facts, declare the law, and enter a declaratory judgment accordingly. The jurisdiction of the court below and of this court having been rightfully invoked, we are compelled to decide the issue as to work-time without regard to what may be the result of an accounting between the parties. Courts should not consider the consequences of their legal decisions, except in trying to ascertain the legislative intent in enacting a statute of doubtful meaning; and, whatever may be said as to inferences from the facts, the law of this case is not doubtful. Moreover, no one can say at this time what will be the result of an accounting to be had in the future. We must limit our decision to the issues presented.

At the beginning of the shift the underground employees were required to report at the portal of the mine at a specified time, there to deposit their identification check at the tally office and to board the con-

veyance provided by the company for transportation to a man-unloading station inside the mine. The men rode in skips or ore cars, which were usually coated with grime of the mine, and assumed a crouched position to minimize the hazard of hitting their skulls against the low tunnel ceiling. Upon reaching the underground station the men left the skip and walked the remaining distance to their respective working places. They were obliged to exercise caution at all times to avoid contact with uninsulated electric wires and other hazards, and carried several pounds of equipment to be used in their work during the day. The men frequently were given instructions as to when and how they should perform their respective duties before the skips left the portal of the mine, and at all times during the descent they were subject to company rules and under company control. The return to the portal at the end of the shift was accomplished in the same manner and under the same conditions.

After considering these and other facts of a similar nature, the court below found as a fact that all of the time thus consumed was work-time and should have been included in the computation of the employees' work-week.[1] Since this travel-time was spent on the employer's premises and subject to its directions, since it exacted mental and physical exertion from the employees under conditions both hazardous and unhealthful, and since it was a course of action pursued solely as a necessary incident to the prosecution of the em-

[1]Tennessee Coal, Iron and R. Co. v. Muscoda Local No. 123 et al, 40 Fed. Supplement 4.

ployer's business, we are unable to say that this finding of the court below was clearly erroneous.

Appellants contend that the industrial history and contractual course of dealing between the parties showed conclusively that travel-time in these iron-ore mines was not working time. It may be conceded, *arguendo*, that for twenty-five years prior to 1938 iron-ore miners had not been compensated for travel-time, and that even after 1938 the parties to this suit had entered into contracts whereby it was agreed that no wages should be paid for travel-time; but the very purpose of the Fair Labor Standards Act was to eliminate labor conditions detrimental to the general welfare of workers, and the remedial machinery set up to accomplish that purpose regulated hours of work and rates of pay. Industrial custom does not warrant the continuation of abuses that the Act was created to rectify; and no contractual agreement that compensation should not be paid for travel-time is valid if in conflict with the Act. The record discloses that this agreement was not a simple statement of admitted fact, but was a compromise adjustment of real differences reached by way of negotiation and concession, and that the workers, though vainly, insisted upon their right to be paid for travel-time.

With respect to time spent by employees checking in and out, and procuring and returning tools, lamps, and carbide, the case stands differently. It appears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed

them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the tally house when arriving for work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time, since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment.

Applying Section 7 of the Act to the facts of this case, we hold that the time spent by underground mining employees of appellants, from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties, constituted working time comprising the work-week; that appellants have not compensated said employees for some of said working time; and that reference of the cause to a master for calculation of amounts due said employees was proper.

It is ordered that the judgment appealed from be, and the same hereby is, modified so as to conform to our holding as to work-time. As so modified, the judgment is affirmed; and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

SIBLEY, Circuit Judge, Dissenting:

The judgment about to be entered, in my opinion,

misconstrues and misapplies the Fair Labor Standards Act, and visits on the appellants most unjustly a heavy pecuniary penalty; and if followed in other cases and by other courts will cause great confusion in the iron and coal mining industries at a time when the country can least afford confusion.

The Act does not define "work time" or even "work." It may apply to each and every industry. What would be work in one industry may not be in another. It seems to me that a man is at work, for the purposes of the Act, when he is doing what he is hired to do. It may involve mental or physical effort, or it may consist in simple presence. It all depends on the contract of hiring. The Act did not intend to upset and nullify the wage contracts of force in the various industries. It simply fixed minimum wages for work done under them, and maximum hours. Of course contracts yield to the Act on these points, but they still control as to the work to be done, and the way it is to be done, and as to the scale of pay if not less than the minimum fixed by the Act. These things are left to bargaining, and especially to collective bargaining under the principles of the National Labor Relations Act.

No question is older in such bargaining than the question whether "travel time" is to be included in "work time." The worker has always thought he ought not to lose all of the time necessary to go to and from his place of work; the employer has thought he ought not to pay for time that produces no work results. The dispute has been resolved in various ways in employment contracts for pay estimated by the hour. Plumbers demand and get pay from the time they leave their

place of business to go to a job until they return. Railroad trainmen get pay from the time they report for duty, no matter what delay may occur in the starting of the train. Railway track-men also are paid from the hour of their assembly at the section point, though they may ride their motor car for miles before doing any track work. On the other hand carpenters, masons, and most artisans and laborers are paid for work only after they take up their tools on the job. As to coal and iron ore miners, traditionally they have been paid according to production, but their modern contracts have always included an express agreement as to their work time, and that agreement has excluded from work time the travel time in reaching the coal seam or ore bed, which were agreed to be the place of work. This is true of the collective bargains made by strong unions throughout the Appalachian region, as it is true of the bargains under which the miners in this case have worked.[1] Their work time is agreed to be that spent at

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[1]On Sept. 18, 1933, the President approved a code for the Bituminous Coal Industry under the National Industrial Recovery Act which provided: "Seven hours of labor shall constitute a day's work and this means seven hours of work at the usual working places for all classes of labor exclusive of the lunch period, whether they be paid on the day, or the tonnage, or other piece work basis."

The Appalachian agreement, which was and is the basis of the Union contracts with the eastern coal mines contains the provision: "Seven hours of labor shall constitute a day's work. The seven hour day means seven hours work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

Under these contracts "the usual working place" for miners has been universally understood to mean the face of the coal seam, and "travel time" to reach the seam is not "work time." The con-

the ore bed. The employers' arrangement to get them to that place reliably and safely is primarily for the benefit of the miner and is not work for the employer, according to these agreements. The discomforts and dangers of the trip, as well as the loss of time, are all considered in fixing the rate of pay for the work of extracting the ore, and the pay scales here involved are far above the minimum fixed by the Act. The miner's work is hard and dangerous, but his pay is supposed to compensate for all this. If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute, (some western States have such statutes), it will operate justly *in futuro*, and not by unexpected penalty, as here.

There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners

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tracts and the practice have been of this sort since the eight hour day was established in 1898.

The contract between appellant Tennessee Coal and Iron Company and the union of its miners signed in October, 1938, Sect. 4, defined a day's work as eight hours, and a week's work as forty hours. "The eight hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or paid on the tonnage basis." As in coal mining, the usual working place of the miner has always been the face of the ore bed. The other appellants had more or less formal contracts to the same effect. Travel time has never been paid or expected under any of them.

agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act.

Though these miners are paid according to their production of ore, they may not under the Act be employed, that is, "suffered or permitted to work," longer than the maximum hours per week without increased pay. These mines provide against that by fixing the hours at which they admit the miners and require them to leave, and especially by limiting the hours during which power is furnished for their drills. Section 7 of the Act has not been violated in this case unless the travel time is counted as work time, contrary to the contracts of employment and contrary to the expectations of those concerned for the past four years. Identical provisions in the employment contracts of the coal miners were decided by the Administrator to be good under the Act, and his conclusion was published, and thought applicable to the contracts here involved, until recently another position was taken as to iron mines.

It is now proposed to assess against these appellants as back pay for overtime an estimated quarter of a million dollars to be doubled by way of penalty, to compensate the miners for their time in going to and from their place of work, in the face of their agreements that this time was not in their work time. They

are to get three times as much per hour for riding and walking to and from the work they were hired to do, as they get for doing the work itself. The injustice of it to me is shocking.

If the decision stands and is followed, chaotic conditions will ensue, and this is good ground to believe that Congress intended no such thing. If for travel time triple back pay is due by these mines, it is due by all the iron mines having similar wage agreements. Many will go broke, or have to cease operations, causing a loss of jobs to their men. The new mines are not deep, and travel time is negligible, but one of the mines here involved is old and extensive, and the travel time is about one and a half hours per day. This is nearly a quarter of the present work day of seven hours. If that time is to be unproductive, but as costly as the production time, this mine can hardly survive. The wage scales for each mine everywhere will have to be renegotiated to adjust business for the future to the new conditions, with the risk of discontents and strikes.

The decision will have to be applied also to the coal mines. Coal and iron ore occur in similar beds, and are mined in the same general way. In both, the old mines have the same difficulties. The collective agreements made by strong unions throughout the Appalachian country all contain the provision as to worktime we are now dealing with. When the Administrator first proposed to contend for what this court is about to do, it was the unions who objected most cogently, and successfully. The letter of the Legal Director of

United Mine Workers of America' to the Administrator which appears in this record is a very strong argument against the invalidating of the agreements. That argument prevailed then. It ought to prevail now, for it applies as exactly to the iron ore workers as it did to the coal miners. The chaos predicted for the latter will come to both if the Act is so interpreted as to invalidate all these agreements.

'Letter of Earl E. Houck to Philip B. Fleming, Administrator, dated July 9, 1940. That letter states, among other things: "Travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898. It is urged that any ruling requiring such a change in the custom, tradition, and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States."

A True copy:
Teste:

OAKLEY F. DODD,
Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit.

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT ON APPLICATION FOR REHEARING RENDERED JULY 27, 1943.

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 10278

TENNESSEE COAL, IRON & RAILROAD COMPANY,
Appellant,

versus

MUSCODA LOCAL NO. 123, ETC., ET AL.,
Appellees.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
Appellant,

versus

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.,
Appellees.

REPUBLIC STEEL CORPORATION,
Appellant,

versus

RAIMUND LOCAL NO. 121, ETC., ET AL.,
Appellees.

Appeals from the District Court of the United States for the Northern District of Alabama.

ON PETITION FOR REHEARING

(July 27, 1943)

Before SIBLEY, HOLMES, and McCORD, Circuit Judges

HOLMES, Circuit Judge: In the petition for a rehearing it is stated that the court's opinion in this case is far-reaching in its effect, extending to all iron-ore, limestone, and coal-mining employees in the United States, and "is of the greatest concern to millions of people and the general public." In the same petition it is argued that the facts upon which the court's conclusion was based "applied to only a few of the appellants' employees and never applied to a great many employees." Passing over the inconsistency of these statements, it is only necessary to say that if the facts on which our opinion is based apply only to a few of appellants' employees, then the law as we have declared it affects only those few, because the law arises out of the facts: *Ex facto jus oritur.*

The parties agreed below that, if the issue as to working time should be decided against appellants, the court should then determine whether or not the employees were entitled to recover and, if so, how much. In the absence of this agreement there was nothing to show that reference to a master for an accounting was necessary after the issue as to working time was finally adjudicated. A declaratory judgment is for the purpose of finally settling an actual controversy, and ordinarily should not be entered if it will not do so. We do not understand that appellants even now are objecting to the reference. They seem to think they have been cut off from presenting defenses to claims against them on the accounting; but in this they are in error except that the declaratory judgment herein as to what constitutes working time will be *res judicata* in any controversy that may arise between the same

parties. In order to remove all doubt on this subject, it is ordered that our former opinion and judgment be amended by striking out the following: "that appellants have not compensated said employees for some of said working time."

The apparent confusion in which the appellants find themselves is doubtless caused by their failure to recall the nature of the actions that they themselves originally instituted. This appeal involves three separate civil actions that were consolidated for trial in the court below and disposed of by a single judgment. All of these suits were brought under the Federal Declaratory Judgments Act, which provides that in cases of actual controversy the courts of the United States shall have power to declare the rights and other legal relations of any interested party petitioning therefor, and that such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

This is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction. It should be given a liberal construction and application.[2] A court may not arbitrarily refuse to exercise such jurisdiction in a proper case, but must decide the issue presented in accordance with the law and the evidence. The procedure is expressly provided for in number 57 of the federal rules of civil procedure, and the technicalities of equity practice do not prevail therein. The courts

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[1]Judicial Code, Sec. 274d, as amended; 28 U. S. C. A. 40; Rule 57 of Federal Rules of Civil Procedure.

[2]Miss. Power & Light Co. v. City of Jackson, 116 F. (2) 924, cert. denied, 61 S. Ct. 741.

are limited in their jurisdiction to cases of actual controversy of a justiciable nature, thus excluding an advisory decree.[3]

In the case before us both sides joined in the petition for a judicial declaration of the rights and legal relations of the parties, and no objection was made to a consolidation of the cases for trial or to the entry of a single judgment containing such declaration. On the contrary, at a pretrial hearing it was agreed by all of the parties that the primary issue in controversy was what constituted the working time that made up the workweek of employees within the meaning of Section 7 of the Act. The contention of each side was stated, and it was agreed that, if the court decided the above issue against appellants, it would then determine whether appellees were entitled to recover and, if so, how much. The rights of all parties were reserved to present their respective claims and defenses upon an accounting. From these and other agreements in the record,[4] it appears that there is only one controverted issue before us at this time, which is what constitutes the working time of these underground ore-mining employees.

The objections to the majority opinion raised on the petition for rehearing may be subdivided, and stated under three heads, as follows:

(1) That the declaration is too narrow to cover all but a few of appellants' employees.

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[3]Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699.

[4]R. pp. 278-283.

(2) That it is so restricted as to time as to include only the period extending from the date of the Act to the filing of suit.

(3) That this court erroneously declared the law as to when the working time of the employees began and ended.

As to the first objection, we have previously pointed out that the declaratory judgment is limited by the facts of the case. It is decisive of the exact controversy that appellants petitioned the court to determine and agreed was the primary issue to be decided. They asserted, and asked the court to say, that no part of the time spent by their underground employees in the bath house, or in going to and from the bath house, or to and from the portal, or to and from the man-loading station, or to and from their actual working places, constituted a part of the workweek under Section 7 of the Far Labor Standards Act. We held, in substance, that no part of the time spent in going to and from the bath house, or in the bath house or in going to and from the portal, was working time, but that the employment began at the time the employees were required to report and did report, at the portal for departure underground, and ended upon their return thereto at the end of the shift less the lunch period. If not required to report at any special time, as contended, then t compensatory employment should begin at the time of departure for the trip underground.

The second objection is that this court did not declare the rights and legal relations of the parties as they existed or may exist subsequent to the date suit was filed. There are no facts in the record to support a

finding covering this period, and no finding thereon was made by the district court; but we were told at the hearing, and it is stated in one of the briefs, that after the filing of these suits wages were paid upon a portal-to-portal basis. We cannot enter advisory judgments upon hypothetical facts. The declaratory judgment procedure does not change the essential requisites for the exercise of judicial power. The courts are limited in their jurisdiction to cases of actual controversy of a justiciable nature.[1] We have, therefore, decided the only actual controversy over which we have jurisdiction; and the plenary effect of the judgment as *res judicata* is ample protection for the future.

The third point stressed by appellants is that a mixed question of law and fact was submitted to the district court, in answer to which it incorrectly found the facts and erroneously declared the law. On appeal both contentions may be reduced to a single question of law, which is: Was the finding of fact of the court below as to working time clearly erroneous? In reviewing the decision of the trial court we are bound by Rule 52 of the federal rules of civil procedure, which provides that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Even where there is no dispute about the facts, if

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[1]Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249; Ashwander v. Valley Authority, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699; Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; Gully, Tax Collector v. Interstate Nat. Gas Co., 82 F. (2) 145 (C. C. A. 5th).

different reasonable inferences may fairly be drawn from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. That this dispute turns upon questions of fact does not withdraw it from judicial cognizance in an action for a declaratory judgment. "The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice.'" The parties saw fit to submit the issues of fact to the court, without a jury, but this does not render indistinguishable the issues of law and fact. What constituted the workweek of these employees and how many hours they were suffered or permitted to work are questions of fact.

Upon reviewing the judgment as to the facts, an appellate court looks first to the findings of the court below, and then to the evidence in the record to ascertain whether or not those findings are clearly erroneous. The character of the controversy and the issue to be determined are the same as if this were merely an action by an employee for damages under Section 7 of the Act, viz: How many hours constituted his workweek or how long did his employer suffer or permit him to work? In its ultimate aspect this is a dispute over wages, only one element of which is in controversy: the working time, which is a factual quantity of wages just as the regular rate is a factual element of wages. These two factors multiplied together form the product that indicates the compensation.

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*Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 242.

The statute simply says that no one shall be employed for a workweek longer than the hours stated unless the employee receives compensation for the excess hours at a rate not less than one and one-half times the regular rate. That is all the pertinent law involved in this controversy. It is the only statutory provision necessary to be construed. It must be liberally construed.[1] The language is plain, it requires no outside aid in its interpretation; it contains simple words that are in common use; and, under fundamental rules of construction, such words must be given their usual and ordinary meaning.[2] The statute itself defines the word employ to include to suffer or to permit to work. The legislative intent is clear, but it is expressed in general terms and does not extend to particular instances. The myriads of circumstances in which it would be necessary to determine working time in individual cases or classes of cases could not be covered with particularity by statute.

The record in this case presents no substantial question of law except whether or not the finding of the district court as to working time was clearly erroneous. This depends upon whether the inference, which was the basis of the finding, was a reasonable one. As modified by us, we think it was, because the ordinary man might fairly have drawn it from the evidence. It

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[1]Bowie v. Gonzalez, 117 F. (2) 11; Carleton Screw Products Co. v. Fleming, 126 F. (2) 537.

[2]Hamilton v. Rathbone, 175 U. S. 414, 421; Mackenzie v. Hare, 239 U. S. 299, 308; Caminetti v. United States, 242 U. S. 470, 485; Louisville and Nashville Railroad Co. v. United States, 282 U. S. 740, 759.

was a deduction that the average disinterested person might naturally have made from the facts. The deduction being warranted by the facts, it was not arbitrary and not clearly erroneous. This being true, the rule above quoted is that the finding "shall not be set aside."

These mines are located in Alabama. The contract of employment is being performed there, and the law of that state governs its performance subject to the overriding provision of the federal act that requires payment to employees of additional compensation for employment in excess of the hours specified. This controversy is over the amount of wages that should be paid; it turns upon the number of hours that the miners were employed within the meaning of the Act. There is no decision of an appellate court directly in point, though there is one from a federal district court in Idaho.[8] Workmen's compensation cases are not very helpful; they prove too much;[9] but one of them is of

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[8]Sunshine Mining Co. v. Carver, 41 Fed. Supp. 60, wherein the court held that time spent by miners in traveling from portal of mine to their usual place of work and back to portal should be included in hours worked, for which they were entitled to compensation under the Fair Labor Standards Act. See also Sirmon v. Cron & Gracey, 44 Fed. Supp. 29.

[9]In such cases the employee is generally protected while on or about the premises of his employer. In Jett v. Turner, 110 So. 702, the Supreme Court of Alabama said (p. 704):

> "While the employee is being transported by the employer pursuant to the contract of employment, it cannot be questioned they have entered upon the day's work wherein mutual duties of employer and employee are presently being performed. The pay of the employee has begun, not in wages, but in service. . . ."

value not as a compensation case but as an authority to support our ruling that what is working time is a question of fact." There is a decision under the Hours of Service Act" wherein the Supreme Court held that members of a train crew under orders, liable to be called at any moment and not at liberty to go away, were none the less on duty when inactive. The court said: "Their duty was to stand and wait."[8]

The law in dispute in the instant case covers less than a page," but the facts are contained in seven volumes of a printed record of nearly five thousand pages. The federal act does not supersede the local law in the several states except to the extent of a conflict between them. It is for this reason that we attach im-

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See also Overton v. Belcher, 168 So. 442; Moss v. Hamilton, 174 So. 622.

Moss Tie Co. v. Tanner, 44 F. (2) 928, was a case from the 5th Circuit under the Longshoremen and Harbor Workers Compensation Act, 33 U. S. C. A. 901 et seq., holding that an employee is generally in the course of employment while going to or from place of work by only practical route.

In Bountiful Brick Co. v. Giles, 276 U. S. 154, under the Workmen's Compensation Act of Utah, the United States Supreme Court said that the employment may begin in point of time before the work is entered upon and, probably as a general rule, may be said to begin "when the employee reaches the entrance of the employer's premises where the work is to be done."

"Overton v. Belcher, 168 U. S. 442.

"Act of March 4, 1907, c. 2939, 34 Stat. 1415.

"Missouri, K. & T. Ry. Co. v. United States 231 U. S. 112, 119.

"No employer shall employ any of his employees for a workweek longer than 44, 42, or 40 hours, respectively, "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed." Sec. 7 (a) of Act of June 25, 1938, c. 676, 57 Stat. 1063, 28 U. S. C. A. 207.

portance to an Alabama decision distinguishing between a finding of fact and a conclusion of law." In that case the court did not discuss the distinction, but what courts do is sometimes more important than what they say; and this is what the Alabama court did: Upon an issue as to the relation between the workman and the employer, it set aside the trial court's conclusion of law as inconsistent with its finding of fact. If the status of a workman when injured on the defendant's premises is a factual condition, the same is true as to the activities of miners. In the case cited we find the Supreme Court of Alabama drawing the distinction between questions of law and fact. The same distinction exists in federal law and procedure, and there is nothing to the contrary in the Fair Labor Standards Act.

If the Alabama law governs, then why does not the agreement as to rates of pay and hours of employment prevail? The answer is this: It does except to the extent that the agreement conflicts with the paramount provisions of federal law. No agreement as to the hours worked or as to the time of employment is valid if the actual employment is longer than the time stipulated and is in excess of the hours specified in Section 7 of the Act. Whether one is working, resting, idling, playing, or preparing to work is as much a matter of fact as whether one is asleep or awake, or is laughing or crying. In *Skidmore v. Swift and Co.*, . . . F. (2) . . . , this court recently held, in an action for overtime compensation under 29 U. S. C. A. 207, that the burden

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"Overton v. Belcher, 168 U. S. 442.

was on the employees to segregate the actual hours of employment from the time spent by them in playing, sleeping, bathing, shaving, and dressing. So we say the Act does not define these instances; their peculiar character must be determined by evidence. Two people may be in swimming, an instructor and his pupil; one will be working and the other playing. The working time of every miner is a definite controlling fact that can and must be finally determined in order to fix the amount of wages due him under the federal statute. It is a fact that cannot be found in any statute or decision or law book (except statutes not applicable in this case), but must be determined by the court or jury in any justiciable controversy wherein a real issue arises with respect thereto."

In a supplemental brief, one of the appellants says

"The court below found the following: The employees were required to report at the beginning of a shift in time to catch the vehicle on one of its trips underground. After reporting at the mouth of the mine the men were daily subject to instructions by the company, and frequently were given their first instructions of the day prior to entering the slope. They were forbidden to enter the mines until their brass checks had been deposited at the tally house. At this point vacancies in working crews were ordered filled by company officials; the head miner or crew foreman began to assemble his crew and to issue orders to its members. When the miners reported at the mouth they were in their working clothes and had their indispensable lamps. The loading of the men into the vehicle in which they were to be transported, as well as the speed and schedule of the vehicle, were under the control and supervision of appellants. They required the men to ride rather than to walk, and required certain ones to ride on particular trips. The miners, being under the disciplinary rules of the company and the supervision of its officials, were subject to conditions peculiar to their occupation from the time they entered the portal until their exit therefrom.

that the effect of our decision, the plain and definite holding of the majority, is that as a matter of law the time consumed in traveling from the portal of the mine to the face and in returning therefrom to the portal "must be included in the working time that makes up the work-week of every ore-mining employee within the meaning of Section 7 of the Fair Labor Standards Act." We did not so hold, and such should not be the effect of our decision.

We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as a matter of law, or as denying the principle that in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually affected. The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal." We have expounded no rigid definition of working time.

The Act fails to provide one, and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely, "because the

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"Agreements as to working time or the rate of pay are not conclusive if the parties do not act in conformity to the agreements. The court below found that during approximately sixty years of iron-ore mining in the Birmingham district red-ore miners had been paid without regard to the number of hours spent daily at the face or at any specified place or station; and that there had never been any custom under which the miners were paid solely for time actually spent at their particular stations underground.

employment relationships to which the Act would apply were so various and unpredictable.'"[9]

Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We did not do either; we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances. The Act of Congress in this respect differs from the legislation of those mining states that limit work-time in underground mines to eight hours per day, and that include in this reckoning all time spent underground."

The pertinent distinction between such state legislation and the Fair Labor Standards Act is that the state legislatures themselves drew the inference of fact as to the working time of miners and enacted a general law on the subject, whereas the Congress failed to pro-

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[9]Walling v. Belo Corporation, 316 U. S. 624, 634, 86 L. Ed. 1716, 1723.

[10]Arizona Laws of 1912, c. 28, Sec. 2 & 3, p. 59; Arizona Code Ann. (1939), Vol. 4, Secs. 56-115; Utah Laws of 1937, c. 59, amending Rev. Stat. (1933), Secs. 49-3-2. Cf. Nevada Comp. Laws (1929), Vol. 5, Sec. 10237. In the Wyoming statute an express disclaimer was inserted excepting "time consumed in going to and returning from work." Wyo. Rev. Stat. Ann. (1931), Secs. 63-103, 63-107. The Nevada statute limits underground work to eight hours, and provides that this shall "include the time employed, occupied, or consumed from the time of reaching the point of employment or place of work in any underground mine, and in returning to the surface from said point or place of work, and that it is the intent and purpose of this act that the period of time between arriving at the point or place of work, in any underground working, and returning to the surface from such point of work shall not exceed eight (8) hours within any twenty-four hours."

vide a general rule or definition in any particular industry. As appellants themselves have pointed out, Section 7 is not limited in its application to any single industry, but is designed to provide a law as to overtime compensation for every sort of work to which the statute is applicable. A detailed code for each industry would have been utterly impracticable. Application to each particular situation of the uniform rule laid down by Congress was wisely left to the courts. Therefore, in actions under the Fair Labor Standards Act, the courts must decide justiciable controversies as to working time upon the law and the facts in accordance with the principles governing their jurisdiction and procedure. Unless the facts are undisputed and only one reasonable inference may fairly be drawn therefrom, what is working time is always a question of fact for the court or jury. In view of the diverse legislation above cited, and the general diversity of opinion on the subject, it cannot successfully be argued in this case that only one fair and reasonable inference may be drawn from the facts and circumstances in evidence.

Although from a state court decision,* the following is highly persuasive upon the point under discussion:

> "The trior of an issue of fact, whether judge or jury, where the ultimate fact to be proven depends on the surrounding facts and circumstances of the transaction out of which the ultimate fact grew, must by process of reasoning and deduction find the ultimate fact. It, from the undisputed facts and circumstances, two reasonable inferences of fact may be

*Huckaby v. Jenkins, 121 So. 130, 131, 153 Miss. 359, 361.

drawn, which inferences are conflicting, and the trior of the issue of fact has found in favor of one as the more reasonable, such finding will not be set aside on appeal, unless against the overwhelming weight of the evidence.

"The chancellor in this case heard and saw the witnesses testify, and observed their demeanor on the witness stand. It could have been reasonably inferred from the undisputed evidence that the transfer of the bank deposit was intended as a gift absolute, and, on the other hand, it could have been reasonably inferred that it was a transfer in trust. The chancellor found that the latter was the more reasonable inference. The two inferences, of course, were conflicting. The chancellor settled the conflict. This court cannot substitute its judgment for his."

That the federal rule is practically the same, see *South Chicago Coal and Dock Co. v. Bassett,*[8] wherein the petitioners urged that whether the decedent was a member of the crew was a question of law, since the facts were undisputed; but the Supreme Court held it to be one of fact, and said that even if the evidence permitted conflicting inferences, there was enough to sustain the Commissioner's ruling. In *Commissioner v Horseshoe Lease Syndicate,*[9] a case from the Fifth Circuit, the court said that a finding of fact must be upheld "even though conflicting inferences fairly

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[8]309 U. S. 251, 260, 60 S. Ct. 544, 84 L. Ed. 732, 738.

[9]110 F. (2) 748, 750.

might be drawn by reasonable men from the undisputed facts.'"*

All of these decisions are persuasive of the correctness of our construction of that portion of Rule No. 52, previously quoted, which is that, in actions tried upon the facts without a jury, a finding of fact should not be set aside as clearly erroneous if from the undisputed facts and circumstances two reasonable inferences were fairly deducible and the trial court found in favor of one as being the correct inference. Any other construction of the rule would be equivalent to holding that a reasonable inference fairly drawn from undisputed facts was clearly erroneous, which would be reducing the matter to an absurdity. On the other hand, as will be pointed out in the next paragraph, very serious consequences with reference to state mining statutes might follow a final authoritative ruling that the only reasonable inference deducible is that travel-time is not work-time.

If the contention is sound that the court below should have entered a declaratory judgment for appellants, as prayed, but could not correctly enter one against them, as it did, because only one reasonable inference could fairly be drawn from the undisputed facts in evidence (which was that travel-time was not work-time), then the question instantly presents itself

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*Cf. Turner v. New York, 168 U. S. 90, 95, 18 S. Ct. 38, 42 L. Ed. 392, wherein it was held that a mere inference of fact from the evidence was not reviewable by the Supreme Court on writ of error, that court being authorized to review only questions of law. This decision is authority for the propositon that such an inference as we are considering is a question of fact, and not a mixed question of law and fact as is being contended by appellants.

as to whether or not the Utah and Arizona statutes are merely arbitrary fiats, violative of the Fourteenth Amendment. The appellants would probably not press their argument to this extent, and yet if it were clearly error for the court below to make the inference it did as to working time, it would be difficult to conceive of facts in existence sufficient to uphold a state statute in which the same inference is not only implicit but must serve as the basis for an absolute rule of law that travel-time underground is work-time.

It being unnecessary for us to decide anything about the propriety of referring the case to a master for an accounting, since the parties have agreed that the court shall determine whether or not the employees are entitled to recover and, if so, how much,* the petition for a rehearing is denied.

SIBLEY, Circuit Judge, dissents as to the merits.

A True copy:

Teste:

OAKLEY F. DODD,
Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit.

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*By their conduct and agreements the parties have waived questions of misjoinder of causes of action, misjoinder of parties, and the right of trial by jury. Rules 20, 21, 38, and 39 of Federal Rules of Civil Procedure. A common question of law and fact in a multiplicity of suits is not of itself an independent ground of equitable jurisdiction, either in the courts of Alabama or in the federal courts. Matthews v. Rogers, 284 U. S. 521, and authorities cited at page 530. See also Tribette v. Railroad Co., 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, which the Supreme Court of Alabama followed in Southern Steel Co. v. Hopkins, 174 Ala. 465, 57 So. 11, 40 L. R. A. (N. S.) 464, wherein the Alabama court reconsidered its former opinion and adopted the rule announced in the Tribette case upon the question of the jurisdiction of equity to prevent a multiplicity of suits. For a history of the latter case, see Cumberland Telephone & Telegraph Company v. Williamson, 57 So. 559, and Griffith's Chancery Practice, Sec. 439, p. 461.

LETTER FROM UNITED MINE WORKERS OF AMERICA AND COAL OPERATORS TO ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

1617 Pennsylvania Boulevard,
Philadelphia, Pa., July 9, 1940.

Col. Philip B. Fleming, Administrator,
Wage and Hour Division,
Department of Labor,
Washington, D. C.

Dear Mr. Administrator:

As a result of certain investigations which have been conducted by the Wage and Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association concerning the application of the Fair Labor Standards Act of the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appala-

chian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice-President of Monroe Coal Mining Company; Frederick H. Knight, Counsel for Monroe Coal Mining Company; W. L. Robinson, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the questions of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage and Hour Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be

paid by the day or be paid on the tonnage basis * * *."

The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however to the provisions that it must include within it all of the provisions of the Appalachian Agreement.

The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as a basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In these conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour

days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside a day rate in the North is $.857 per hour, and in the South it is $.80 per hour. The underground workers are paid on this basis, with maximum rates for mobile loading machine operators, approximate $1.09 per hour. In addition, the government provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for at the rate of time and one-half * * *." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the places of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places, are, of course, closer by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, the working places move farther,

and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working place. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places.

Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence,

travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours" work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that would paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates

of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian agreement (which embodies the customs and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretative Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to Interpretative Bulletin No. 13, stating that the standards of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1939, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several dis-

trict agreements based thereon, conform to and satisfy the requirements of the Wage and Hour Act.

Respectfully submitted,

For the United Mine Workers of America:

(S) EARL E. HOUCK,
Director of the Legal Department.

For the Operators:

(S) W. L. ROBISON, Chairman,

(S) CHARLES O'NEILL,

(S) L. T. PUTNAM,

(S) L. C. GUNTER,

(S) J. D. A. MORROW,
Appalachian Joint Conference
Negotiating Committee.

(Plaintiff's Ex. No. 25, R. 1710-16).